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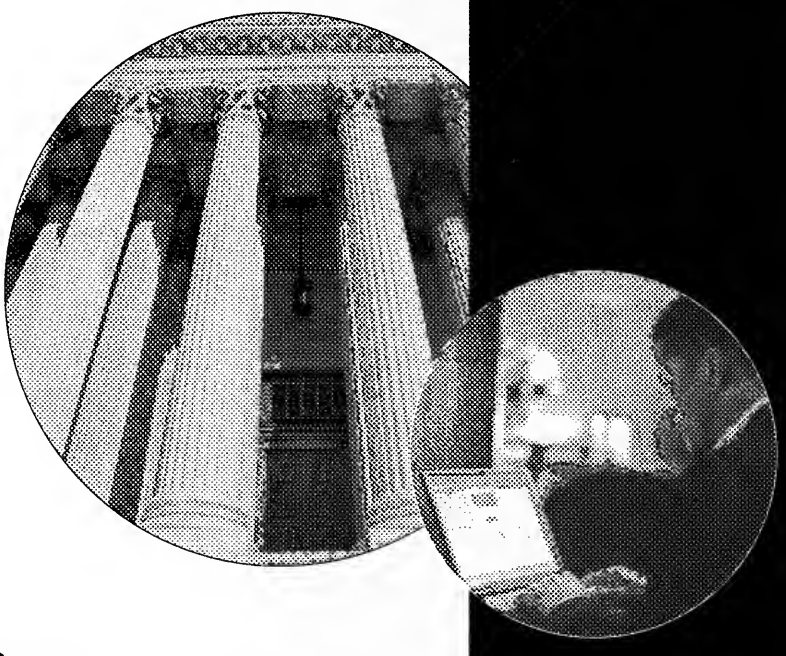

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SYMPOSIUM

REDEDICATION OF THE FEDERAL COURTHOUSE IN INDIANAPOLIS THE 100TH ANNIVERSARY OF THE LAYING OF THE CORNERSTONE MARCH 25, 2003

JUSTICE THEODORE R. BOEHM*

It is an honor to represent the judiciary of the State of Indiana at this happy and significant occasion. Today we celebrate the achievements of the past and the promise of the future in this great landmark. But one cannot mark such an event without recalling that our sons and daughters are once again engaged in a struggle in a foreign land. I know you, and all Americans, hope and pray for their safe return and an early and successful end to the conflict. In the meantime, it is up to us to continue to build the judiciary and other strong institutions that bind the nation together, as well as the physical embodiments of those institutions such as this magnificent century-old courthouse.

Exactly a century ago, the *Indianapolis News* reported "plenty of sunshine, music and people"[1] at the laying of the cornerstone. Included among the crowd were the workers who were to place and set the cornerstone and who, according to the *News*, "wore white duck trousers or new overalls" and "seemed to take an active interest in the affair."[2] Judged by the length of the speeches that day, which were reported verbatim in the press, even appearing to hold their attention was no small achievement and one well beyond the power of most present day orators, certainly mine.

Despite this happy launch, construction of this building was, as you might suspect, not without its challenges. Five days after the cornerstone was laid, the *News* reported that a strike of bricklayers threatened the project.[3] Then, we are told, the stonecutters from Southern Indiana turned out to speak no English and these good German craftsmen were without a foreman to direct the project. At that point, assistance from the State of Indiana was requested, and I am happy to

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* Justice, Indiana Supreme Court. A.B., 1960, Brown University; J.D., 1963, Harvard Law School.

1. *Corner Stone Formally Laid, Various Civic and Military Organizations and Prominent Citizens Participated*, INDIANAPOLIS NEWS, Mar. 25, 1903, at 1.

2. *Id.*

3. *May Delay Work on Federal Building, Threatened Strike of Bricklayers May Interfere*, INDIANAPOLIS NEWS, Mar. 30, 1903, at 15.

report that my predecessors in state government were able to come to the aid of their federal colleagues. A person with both the requisite knowledge of stonecutting and the necessary German language skills was located—in the Michigan City penitentiary. After completing work on the project he returned to serve out the balance of his sentence. I am sure you understand that this would not have been able to be accomplished without the careful foresight and assistance of the Indiana State Judiciary. We are always happy to help out where we can.

I hope you will forgive a personal note. This is the first time I have had the privilege of addressing the federal bench from this altitude. For twenty-five years I labored as a lowly lawyer practicing for the most part in this building and groveling in the pits below the bench. And for the vast majority of time, the same four judges constituted the bench in the Southern District of Indiana, Indianapolis Division. So I began my career bowing and scraping equally to the kind and patient suggestions of Chief Judge Steckler and the stern scowls of Judge Holder. For a quarter of a century, not much changed—not the judges, not the building, and not the practice of law.

Frequently my cases involved lawyers from other parts of the country, usually big cities. Invariably their first comment was "What a great courtroom." And their first questions were "Don't you have any security here?" and "How is it that you know everybody?" The days of security-free federal courtrooms are gone, as is the time when the bar was small enough that we usually had dealt with the local opponent before and knew we were likely to do so again.

Despite these changes the dignity and grace of this building remain a constant. Public buildings are indeed both an embodiment and reminder of our public life. Small children learn through direct visual impression the importance of what goes on here. Adults appreciate the detail, planning and sacrifice it took to put this structure into place. The keynote speaker of a century ago dubbed this building "the abode of national justice."[4] Those who built the federal building of 1903 knew they were making a contribution for the ages. It stood then and it stands now as a proud symbol of an independent judiciary. We can repay that foresight only by enhancing it as the needs grow, but always preserving its original majesty.

It was highly controversial in the middle 1980s when Governor Orr led a restoration of our state capitol. That building was completed in 1888, and the ensuing century it had been allowed to deteriorate into a rabbit warren of small cubicles, temporary structures that stood for decades in various states of disrepair, and an assortment of unidentifiable electrical and ventilating devices. Today no one doubts the wisdom of taking the time and spending the money to restore the state capitol to its original splendor. Our federal building has been mercifully spared the abuse visited upon the State House, but inevitably some touching up was necessary. Beginning in 1992 that was undertaken. Now the federal building at its centennial remains a magnificent monument to the foresight of our predecessors and the wisdom of preservation.

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4. *Corner Stone Formally Laid*, *supra* note 1.

As we celebrate this achievement, let us again be reminded that these buildings, and the republic they serve, did not come easy. We are the caretakers of both and must tend them carefully, for ourselves and for future generations. Particularly in times of national stress, this requires vigilance, perspective, and a sense of history.

I have learned since becoming a Justice of our court that the judiciary in Indiana functions somewhat differently and much more amicably than its counterparts in many states. Anecdotal reports from judges in other parts of the country often suggest adversary relations between trial and appellate benches, between courts of different or overlapping jurisdictions, and between the state and federal judiciaries. Not so in Indiana. I hope not presumptuously, I regard each of the federal judicial officers as a friend and colleague. It is a great pleasure to join them in celebrating a century of achievement in this elegant edifice and marveling at the magnificent structure our forebears created and we now rededicate.

NAMING CEREMONY FOR THE BIRCH BAYH FEDERAL BUILDING AND UNITED STATES COURTHOUSE OCTOBER 24, 2003

JUDGE RICHARD L. YOUNG*

It is truly an honor to be selected to speak at this historic occasion recognizing the public career of former Senator Birch Bayh. Most of us are familiar with Birch Bayh's distinguished career in the United States Senate. However, prior to his election to the Senate, he served with great distinction for eight years in the Indiana House of Representatives. I would like to tell you about those years and a few of his contributions in the area of education in Indiana.

In 1954, at the age of 26, Birch Bayh, operating the family farm in Shirkieville, ran as a Democrat for the Indiana State legislature. He was running against a candidate who had the support of the powerful political machine in Vigo County. With the untiring help of his wife Marvella and by shaking every hand they could find, he scored an upset victory and was sworn in as a Representative on January 7, 1955.

The new year brought new responsibilities as Representative Bayh became familiar with the workings of the legislature. In addition, on December 26, 1955, he became the father of a baby boy whom we all now know as Senator Evan Bayh.

Birch was reelected to the state legislature in 1956 and at the end of the 1957 session he decided to leave the family farm and concentrate on politics. He enrolled in law school at Indiana University and in October 1957, Birch, Marvella and Evan moved to Bloomington.

The two years following Dwight Eisenhower's reelection in 1956 were a rather dismal time for Democrats in Indiana. The Republican party dominated the state. Few Democrats had much desire to serve in leadership positions. Birch was the exception. He ran for and was elected minority leader in 1957.

Two years later the tide turned and the Democrats took control in Indiana. Birch went from being minority leader to Speaker of the House in 1959. He was 30 years old, the youngest speaker ever.

Now just think about that for a moment. Birch was married, a new father, a law student and Speaker of the Indiana House of Representatives. Most of us lawyers well remember those law school days when we thought life was hectic when we had to make a 9:00 a.m. civil procedure class. It seems to me that our Creator doesn't make men like Birch Bayh anymore. His tenure as Speaker lasted two years as the Republicans regained control and Birch went back to being minority leader in 1961.

Of Birch's many accomplishments in the Indiana House, several related to the education of our children. Birch's parents were both school teachers and his interest in education comes quite naturally. As Speaker, Birch led the efforts to reorganize Indiana's public school system. At that time in Indiana, most rural

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counties did not have consolidated school districts. In many counties there were four or five small high schools, some with fewer than 20 students. A concern arose as to the quality of education these students were receiving compared to those students in the larger consolidated school districts.

Birch took on the task to see that all Indiana students were offered the same quality of education. As you may well imagine, there was a great deal of opposition to any form of consolidation. Questions arose such as, "What's wrong with the school we have now?" "If we consolidate, which town gets the school house?" "Will my child have to ride a bus to a new school?" "Who will control our school?"

Those favoring consolidation argued that the larger consolidated schools would have more to offer the students academically and socially. Also, in years past it was difficult for the smaller schools to compete in athletics with the larger schools. By consolidating the schools, the playing field would be more level in all areas.

The resistence to consolidation was strong in many counties, and it was through the hard work and dedication of many brave legislators, led by Speaker Bayh, that the effort to reorganize Indiana's schools was successful. Birch's interest in education didn't stop at school reorganization. Through his leadership, teacher salaries increased by 50 percent and Indiana's universities received increased funding.

Ladies and gentlemen, he accomplished all of this by the age of 34. In 1962, invigorated by the election of John F. Kennedy, Birch ran for the United States Senate against incumbent Senator Homer Capehart. Birch was considered the underdog. However, by campaigning hard, driving all over the state, sleeping in his car and visiting with voters everywhere he could, he defeated Senator Capehart by 10,000 votes statewide. It was clear that Hoosier voters looked Birch over and thought he was quite a guy.

In a few moments, Judge Hamilton will speak to you about Birch Bayh's distinguished United States Senate career. But now, if you will, permit me a personal excursion. I met Senator Birch Bayh in the Fall of 1975 in my home state of Iowa. I had just graduated college and he was there as a candidate for President of the United States. Through a family friend, I was put in touch with the campaign director for Iowa and subsequently joined the cause. In those days campaigns during the Iowa caucuses were quite different from today's costly, high-powered operations. I believe we had, in addition to the Senator, four or five full time people working the entire state. One being myself and another was that fellow I mentioned earlier—Evan Bayh. I could tell you some stories, but time is short. Suffice it to say it was an interesting experience for all and, as they say, the rest is history.

Although Chief Judge McKinney likes to tell people my appointment as federal judge was based entirely on merit, and I certainly appreciate his confidence in me, I must say that I would not be standing here today as a United States District Judge without the support of Evan Bayh, who forwarded my name to President Clinton, and the calming presence of former Senator Birch Bayh who sat with me during my confirmation hearing before the Senate Judiciary Committee. It was very comforting to me when Chairman Orrin Hatch went out

of his way to greet Birch and to let him know how pleased he was to see him at the hearing.

I have been truly blessed to have the friendship of Birch Bayh, and I believe all Hoosiers have been blessed to have this extraordinary individual represent us in the Indiana House of Representatives and the United States Senate. Congratulations, Senator Bayh on this well deserved honor.

DEDICATION OF BIRCH BAYH UNITED STATES COURTHOUSE OCTOBER 24, 2003

JUDGE DAVID F. HAMILTON*

Congressman Hamilton, both Senators Bayh, Governor Kernan, Lieutenant Governor Davis, members of Congress, and many honored guests and fellow citizens, thank you very much. It is truly an honor and privilege to address you on this happy occasion.

My role here is to review briefly Birch Bayh's career in the United States Senate, and to explain, for the record, as it were, why it is so fitting that this magnificent United States Courthouse has been named for him. The task is comparable to an assignment to preach a rousing sermon to the proverbial choir. The challenge is to stick to only the highest of the highlights.

We'll see that Birch Bayh has made a difference. He has made a difference for constitutional law and the stability of our government in times of crisis. He has made a difference for the rights of women and for the rights of racial and ethnic minorities. He has made a difference for young people.

Consider the United States in 1962, when Birch Bayh was first elected to the Senate—a time that some fondly remember as the good old days.

- Racial discrimination, no matter how blatant, was legal in private employment.
- Women were often on the fringes of employment and schools and universities.
- Discrimination on the basis of sex or pregnancy was legally permitted.
- Voting rights were denied to African American citizens by means both blatant and subtle.
- Health care for the elderly was expensive, and insurance for them almost non-existent, forcing families to make painful choices about care for their parents.
- Young men could be drafted and required to serve, and even to die for, their country before they could even vote for the leaders who could order them into combat.
- And the Constitution's answers to problems of presidential succession and disability were completely inadequate—especially in a nuclear age. Just weeks before Birch Bayh was first elected in 1962, the nation had come to the brink of thermonuclear war.

Now consider the picture after Birch Bayh had completed his service in the Senate. Let's start with the Constitution. Judge S. Hugh Dillin of this court has said that part of our job here as judges is to write a series of footnotes to the Constitution. We all do that every year in cases large and small.

Senator Birch Bayh, however, did not write mere footnotes to the Constitution. He played a role unique since this nation's founding and the ratification of the Bill of Rights. In his role as chairman of the Judiciary

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Committee's Subcommittee on Constitutional Amendments, he authored two Amendments that became part of the Constitution itself. These Amendments were vital contributions to the stability and fairness of our system of government.

The 25th Amendment deals with succession to the offices of president and vice president, and with the temporary disability of a president. The Amendment is familiar to all who recall the resignations of Vice President Agnew in 1973 and President Nixon in 1974. On a lighter note, the Amendment is also familiar to those who have watched "The West Wing" this year.

The 25th Amendment did two principal things. First, it established a mechanism to fill a vacancy in the office of vice president. The president nominates a person, subject to confirmation by a majority vote of both the House and the Senate. Second, the Amendment provided a mechanism to address the temporary disability of the president, to restore to the president the powers of office after the disability has ended, and to resolve quickly any disputes on such a delicate matter. Senator Birch Bayh drafted the 25th Amendment, led its adoption by Congress, and pushed for its ratification by the states.

How did Birch Bayh make a difference? The problems posed by succession and disability had been well known, at least since President Garfield's slow death in 1881 and President Wilson's disability after the Treaty of Versailles in 1919. In 1962, there were plenty of good solutions available. The political problem was that there were *too many* solutions. Each had its own supporters and its own problems. The result of too many good ideas had been decades of stalemate. The problems had not seemed urgent, yet they could present a national crisis on a moment's notice—if there were any doubt about who had the power of the presidency.

After President Kennedy's assassination, freshman Senator Birch Bayh studied the problem quickly and thoroughly, and he decided it was time to act. He decided that the best solution lay in the general framework of what became the 25th Amendment. Then he went about the patient work of persuading other Senators, and then persuading the House, state legislatures, and the American public that his solution should be adopted and ratified.

Through his skill as a legislator, he was able to overcome obstacles posed by ego and pride of authorship. He succeeded in persuading other giants of the Senate—men who knew constitutional issues thoroughly—and who were not necessarily modest about the virtues of their own solutions—men such as Senator Kenneth Keating of New York, Senator Everett Dirksen of Illinois, and Senator Sam Ervin of North Carolina—that they should put aside their own preferences and build a consensus around one very good solution to the problems.

The story is one that shows the hallmarks of the legislative process, and the skill of an extraordinary legislator: Birch Bayh stayed focused on the big picture. He showed reasonable flexibility about details, and he found common ground. I cannot improve on the words of Senator Bartlett on the floor of the Senate in 1965: "The Senator from Indiana . . . has done an astounding thing: In his first term, he has studied one of the most delicate and troubling problems of our day, and has found for it, here in the Senate, a well nigh unanimously supported solution."

That solution has been tested, and it has passed its tests, with Vice President

Agnew and President Nixon, and when other presidents have been temporarily disabled. For this, we can all thank Birch Bayh. He has made a difference.

And for those of us in Indiana, he has made a difference indirectly, but very recently. In 1978, Indiana amended its own constitutional provisions dealing with succession and disability. The Indiana legislature consciously modeled the amendment on the 25th Amendment to the Federal Constitution. Sadly, after the late Governor O'Bannon suffered his stroke last month, the disability provisions had to be used for the first time. After Governor O'Bannon died, the succession provisions took effect, and were completed this week with the confirmation of Governor Kernan's nomination of Lieutenant Governor Davis. Those events, in which the Constitution worked well, remind us all how important it is that the governing law be clear and well adapted to its purpose for guiding us in times of crisis.

Birch Bayh also has made a difference with the adoption of the 26th Amendment to the Constitution, which guarantees the right to vote to persons 18 years or older. The 26th Amendment was adopted and ratified in 1971, as the Vietnam War was raging.

During the debates over the war, one point we heard again and again was that it was fundamentally unjust for the national government to draft young men to serve in the Army and to fight in Vietnam without allowing those young men to vote to choose the government that would demand such sacrifices. The controversy over the war brought new focus to an issue that had been percolating since at least the Civil War. The response was the 26th Amendment, which drew support from both those who opposed the war and those who supported it. The basic fairness of the idea—those called upon to fight should also be able to vote—drew widespread support. After the Supreme Court ruled that federal legislation could not guarantee the right to vote in state and local elections, the 26th Amendment was ratified faster than any other Amendment.

Birch Bayh also helped push through Congress the Equal Rights Amendment, which almost became the 27th Amendment to the Constitution. The ERA passed Congress with two-thirds majorities in the House and Senate. Its ratification fell three states short within the time allowed. Nevertheless, the ERA helped put women's rights at the center of national debate. And it might fairly be said that the ERA's supporters lost that battle but have won the war. The ERA anticipated the Supreme Court's movement over the last 30 years toward a position very close to that of the ERA. Now, when law or government policy treats people differently because of their sex, the government must provide an "exceedingly persuasive justification," one that does not "create or perpetuate the legal, social, and economic inferiority of women."[1] Again, Birch Bayh has made a difference.

Let us turn to Birch Bayh's role in legislation. He deserves credit as a principal sponsor of Title 9 of the Education Amendments of 1972. That legislation is best known for creating equal opportunities for girls' and women's sports in schools, colleges, and universities. Millions of girls who have played

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1. United States v. Virginia, 518 U.S. 515, 533-34 (1996).

soccer, basketball, volleyball, or a dozen other sports, and the parents of those millions of girls, can be grateful to Birch Bayh.

Yet athletics were not the principal focus of Title 9. Even more important, the provisions of Title 9 apply much more broadly, to assure equal opportunities in academic and professional programs. The first big test case was about gaining admission to medical school. The opportunities in the classroom have opened the doors to millions of women in traditionally male-dominated careers. Again, Birch Bayh has made a difference.

Birch Bayh also authored the Civil Rights of Institutionalized Persons Act of 1980. The 1970s saw a wave of lawsuits to try to improve the conditions of jails, mental hospitals, and other public institutions that were too often neglected as other, more powerful constituencies obtained funding, and these institutions were left without needed money. Such lawsuits by private parties often fell short, however.

Birch Bayh recognized that the problem was a national one. He recognized that the federal government should not count on private parties to carry the load. He authored this legislation to give the U.S. Department of Justice the authority to investigate and to sue state and local governments to obtain relief from intolerable and unconstitutional conditions.

The Act was an important step to protect the powerless, the disenfranchised—some of the most vulnerable people in our society. And his skill as a legislator was evident, as he struck a careful balance between federal and state and local governments and obtained passage of legislation in this delicate area.

Birch Bayh also co-authored the Bayh-Dole Act of 1980 on patent law. That Act enabled universities to obtain patents on inventions they developed with federal research funds, and to license those patents for commercial use. Before eyes glaze over as I talk about patent law, let's keep in mind that before the Act was adopted, billions of dollars of government funding for research had often led nowhere commercially. The Bayh-Dole Act found a way to balance a number of competing interests and to turn those public investments into a source of economic growth. Last year, The Economist magazine gave the Bayh-Dole Act an extraordinary compliment, calling it "probably the most inspired piece of legislation to be enacted in America over the past half-century." In 1980, only 390 patents were awarded to universities. By 2000, that number had increased by 20-fold, to more than 8000. As a result, Americans have had much greater access to the benefits of the research they have funded with their tax dollars. Again, Birch Bayh has made a difference.

When we focus on the constitutional amendments and the major legislation that Birch Bayh authored, we see only some of the highest peaks of a legislative career that grappled with all the most challenging issues of the 1960s and 70s. We should also remember that Birch Bayh was part of the Congresses that enacted the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Medicare Act, the Clean Air Act, and the Clean Water Act—legislation that has improved the lives of every American family and that has touched every corner of America. We should remember his role in authoring and overseeing the Juvenile Justice Act.

We should also remember that one of the most important words in a legislator's vocabulary is "no"—saying no to ill-advised proposals to amend the Constitution, or saying no to poor nominations. We should remember the critical role Birch Bayh played in blocking the Supreme Court nominations of Judge Haynsworth and Judge Carswell. We should also remember the vital oversight role that Birch Bayh played as Chairman of the Intelligence Committee in the late 1970s.

And of course, I cannot even begin to touch Birch Bayh's thousands of other votes, amendments, and meetings for the benefit of Indiana communities, workers, and businesses that made up so much of the work of a Senator who worked every day to improve the lives of Hoosiers and all other Americans.

Finally, on a more personal note, let me add that Birch Bayh is one of a handful of leaders of his generation who helped inspire a generation of younger Americans, and especially younger Hoosiers, to commit themselves, as he did, to public service—to build their lives around the belief that government can be a force to improve the lives of our fellow citizens. As you might guess, there are a few of us present today. Birch Bayh has not only inspired that younger generation, he continues to go out of his way to help them in their careers of service. For that we are all grateful, and that legacy of his Senate career will also echo for many years to come.

In all these ways, Senator Birch Bayh has made a difference. He has made a difference for the stability of our government and for its basic fairness. And he has made a difference for women and minorities, and for some of the most powerless among us.

Ladies and gentlemen, I submit that it is entirely fitting that this magnificent landmark in the heart of Indiana, where we try to do justice every day, should be named in his honor. Thank you, Senator Bayh, and thank you ladies and gentlemen.

FEDERAL JUSTICE AND MORAL REFORM IN THE UNITED STATES DISTRICT COURT IN INDIANA, 1816-1869*

GEORGE GEIB**
DONALD KITE***

In November 1840, William Martin, an Indiana mail stage driver found himself standing in United States District Court, convicted of stealing a letter containing bank notes from the mail.[1] District Judge Jesse Lynch Holman reviewed the evidence that convinced the jury, and then lectured the defendant upon his future prospects:

> The prospect before you is truly dark and dreary; yet there is a distant ray of hope that may enlighten your path .... You may do much by a patient submission to the law—by a reformation of life and an upright line of conduct . . . to some extent, to regain a station among honest men. You may do more than this: By repentance and reformation, you may obtain the approbation of Him, whose favor is better than life or liberty, and far more valuable than an earthly reputation.[2]

The Judge then sentenced Martin to the minimum penalty, ten years at hard labor.[3]

Moral reformation, the attempt to improve society by improving the character of its citizens and their institutions, is a favored topic of historians of pre-Civil War America, and Judge Holman's words remind us that judges were among the many who were touched by the reforming spirit of that era. This paper is designed to suggest that issues of reform were in fact one of the features of the early District Court a century before the division that created the modern Southern District.

Jesse Lynch Holman offers a good starting point. He was a native of Kentucky, who had read law in Lexington under future presidential contender Henry Clay. Holman had then migrated to the Indiana Territory in 1810, served from 1816 to 1830 on the Indiana Supreme Court, and lost to John Tipton by one vote in the 1831 election for the United States Senate. In 1835, Holman pursued the District Court seat recently vacated following the death of Benjamin Parke, and received an interim commission pending final appointment. The appointment stalled, however, launching Holman on a nine month political quest that extended from the summer of 1835 to the spring of 1836, took him on journeys across Indiana and to Washington, D.C., saw him seriously injured in a stagecoach accident as he crossed the Allegheny Mountains on an icy road, and included a decisive private interview with President Andrew Jackson. We know the story in

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* This essay is derived from the authors' research for a forthcoming history of the District Court to be published by the Indiana Historical Society.

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1. United States v. Martin, 26 F. Cas. 1183 (C.C. Ind. 1840) (No. 15,731).
2. *Id.* at 1186.
3. *Id.*

considerable detail because Holman kept his family closely posted on the confirmation process, and his family (and later Indiana University and Franklin College) carefully preserved his correspondence.[4]

The lengthy process, Holman suggested, owed more to the emerging two-party factionalism of Democrats and Whigs, and to ensuing rivalries among members of the Indiana delegation to Congress, than it did to him personally. In the process, Holman found it necessary to respond to charges that included purported opposition both to Jackson's administration and the selection of Martin Van Buren as Jackson's successor, insufficient legal qualifications to serve as a federal judge, embarrassing personal behavior, and the belief that Holman was, in words reported to him by Indiana Congressman Amos Lane, "a fanatic on the subject of abolition."[5]

Holman eventually satisfied President Jackson, and Indiana's two Senators, that the first three charges were both politically motivated and factually false. As Holman put it in describing his key interview with the President,

> I was fortunate enough to find him alone. He conversed freely on a great variety of subjects. Talked for some time on the subject of my appointment, & the opposition that was got up against me; seemed to be apprized [sic] that the opposition was not so much against me as against my friends.[6]

On the charge of abolitionism, however, Jackson took the time to ask Holman's detailed views.

> [Jackson] mentioned the charge of abolition, . . . which I had answered in several letters, which I had shown him. I satisfied him completely on that subject, & especially by repeating my decision in the first Negro case I acted on a few days after I rcv'd my commission, in which I gave a certificate for removal of the slave to Kentucky. I stated the principles upon which I decided. It gave him entire satisfaction & Carr [Holman's political companion at the interview] remarked afterwards that the Gen'l was particularly pleased with my decision.[7]

Holman did not bother in his family letters to include the details of the case involving the Kentucky slave, probably assuming it was well known to his intended audience. In all likelihood, he had been involved in one of the growing number of recaption, or recapture, cases arising under the 1793 Fugitive Slave Act. The Act responded to Article IV, Section 2 of the Federal Constitution, which read,

> No Person held to Service or Labour in one State, under the Laws

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4. I. George Blake, *Seeking a Federal Judgeship Under Jackson*, IND. MAG. HIST., 1939, at 311-25.

5. Letter from Indiana Congressman Amos Lane to District Judge Jesse Lynch Holman (Dec. 19, 1835).

6. *Id.* at 321-23 (quoting letter from Holman to Allen Hamilton (Feb. 10, 1836)).

7. *Id.*

> thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due.[8]

The 1793 Act made recovery a matter of federal law, creating a process by which slave owners (or their representatives) could, upon oath, recover runaways.[9] Holman's "principles" were undoubtedly those of following the procedures set forth in the Act, and Jackson did not press him. Holman's appointment followed within a month.[10]

Had Jackson pursued the matter, he might have been less satisfied. Holman's earlier legal career had dealt with more than recaption cases, and illustrated some of the challenges that existed at the intersection between state and federal jurisdiction. Under both the Northwest Ordinance and the 1816 State constitution, slavery was barred from Indiana. Holman had cited the Northwest Ordinance as his reason for freeing slaves owned by his wife when the couple first moved to Indiana in 1810. Yet just across the Ohio River was the slave state of Kentucky, from which some masters sought by legalistic subterfuges to bring and retain their slaves. Slave owners most commonly attempted to thwart the territorial ordinance and the Indiana constitution by claiming that their slaves were simply indentured servants who had signed long term labor contracts, enforceable as any contract would be in a state court.

One of the most important of these cases, *In re Clark*, had reached Holman fifteen years earlier, in November 1821, while he was serving on the Indiana Supreme Court.[11] The case centered upon Mary Clark, an African-American woman (or, in the court's terminology, "a woman of color") who had been purchased by a former slaveowner in Kentucky in 1815. The former owner had then brought Clark to Vincennes, where he promptly freed her. At the same time, however, he had contracted with Clark to serve him as an indentured servant for thirty years. A year later he cancelled and destroyed her contract. On the same day, General W. Johnston signed Clark to a twenty-year indenture as a house maid. Mary Clark subsequently petitioned for a writ of habeus corpus, claiming she was held as a slave. General Johnston admitted to the court that he had paid Clark's former owner $350, but argued this was not slavery but merely indentured servitude. A lower court in Knox County agreed with Johnston. The State Supreme Court, in an opinion written by Holman, disagreed.[12]

The Indiana Supreme Court agreed that any Indiana resident, including Mary Clark, could enter into a contract for personal services. Contracts for specific performance were not legal, however, because they were indistinguishable from

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8. U.S. CONST. art. IV, § 2.

9. DON FEHRENBACHER, THE SLAVEHOLDING REPUBLIC 205-30 (Oxford Univ. Press 2001).

10. Blake, *supra* note 4, at 324 (quoting letter from William Hendricks to Holman (Apr. 1, 1836)).

11. 1 Blackf. 122 (Ind. 1821).

12. Sandra Boyd Williams, *The Indiana Supreme Court and the Struggle Against Slavery*, 30 IND. L. REV. 305, 307-09 (1997) (citing *In re Clark*, 1 Blackf. at 123-24).

slavery or involuntary servitude, which was banned in the Indiana Constitution. Here are Holman's words:

> Such a performance, if enforced by law, would produce a state of servitude as degrading and demoralizing in its consequences, as a state of absolute slavery; and if enforced under a government like ours, which acknowledges a personal equality, it would be productive of a state of feeling more discordant and irritating than slavery itself.[13]

Neither the issues of the case, nor its decision, should come as a surprise to those familiar with the early factionalism of the Democratic-Republican Party in Indiana. When the State held its first elections in 1816, its dominant political leader, Jonathan Jennings, had campaigned upon a platform that rejected the ideals of the plantation, slavery included. Jennings affirmed instead the primacy of the independent, hard-working citizen—what has often been called the Jeffersonian yeoman farmer. Identifying the center of the old politics with Vincennes and Knox County, Jennings crafted an appeal based upon democratic participation and opportunity that resonated with secure majorities of voters, especially in the Whitewater River Valley and other eastern and southern portions of the early State. For a Jennings appointee to Indiana's highest court to overturn a Knox County decision, and thereby reject a form of labor identified with plantation culture, was only to be expected.[14]

The search for the context of Holman's ideas and activities can extend beyond politics. Both court history and the legal implications of reform are established topics within the study of antebellum America. Historians usually treat them in separate chapters, particularly at the state level, saving the intersection of law and reform until discussions of the sectional legislative crises that repeatedly agitated Congress. Yet Holman's responses to the charges of abolitionism show one of the key antebellum reform issues, anti-slavery, rearing its head in the history of the District Court independent of any specific national crisis. Reform can thus serve as an invitation to us to rethink the manner of interpreting the history of the United States District Court for the Southern District of Indiana.

The recent bicentennial of the United States Constitution served as the occasion for publishing a number of histories of District Courts in other states. The histories are as varied in scope as the states they cover, but in covering the antebellum era they generally include three themes. First, they explore the interaction of law and politics in that exuberantly participatory era. Second, they document that the quest for a federal balance, a definition of the tensions and borders between state and federal authority, was present in the district courts as well as in the Supreme Court. Third, the histories frequently explore landmark district court decisions.[15]

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13. *In re Clark*, 1 Blackf. at 124-25.

14. ANDREW CAYTON, FRONTIER INDIANA 226-60 (Indiana Univ. Press 1996).

15. *See, e.g.*, PATRICIA BRAKE, JUSTICE IN THE VALLEY: A BICENTENNIAL PERSPECTIVE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE (Hillsboro Press 1998); RICHARD CAHAN, A COURT THAT SHAPED AMERICA: CHICAGO'S FEDERAL DISTRICT COURT

Holman's nomination allows us to speak to all three of these. He clearly was caught up in current political discourse. It must have been an interesting moment for him, as a lawyer trained by Henry Clay, a prominent Whig, to explain, as Holman did, his support for two of Clay's great Democratic rivals, Jackson and Van Buren. Holman was also clearly expected to have the legal skills to manage the tensions between state and federal authority on issues such as recaption. And he was explicitly asked to explain the "principles" he would use in interpreting federal law and providing legal precedent. Yet what stands out in his tale is the central role that reform, and specifically anti-slavery sentiment, played in it.

Histories of reform are a staple of antebellum studies, and here again several themes seem to enjoy continued interest. We are often asked where in America, when in time, why in motivation, and who in support made the reform impulse of the antebellum years such a force to be reckoned with. Were the reforms broadly national in scope, or more narrowly limited to a particular region such as the New England? Were they a continuing feature of several decades, or a force building over time? Were they religious or secular in their underlying spirit? And did they gain or repel adherents as they developed?[16]

Holman is an interesting case study. Born and educated in Kentucky, his relocation to Indiana took him just across the Ohio River to Aurora, where he built his home and career. His most important reform decision, *In re Clark*, came early in his career, and on the surface as much in response to state politics as to any other motive. His motives seem fairly clear until we add one fascinating dimension: his religious beliefs. Holman was a devout Baptist.

His religious training came early. Holman learned his "letters" by reading the Bible in his parents' home in Mercer County, Kentucky. In his adult years he could recollect the contents of the first sermon he heard when he was four years old. He assisted in "gathering" the Aurora Church, organized his county's Sunday School Association, went on to become a national vice president of the American Sunday-School Union, and president at various times of the Western Baptist Publication and Sunday-School Society, of the Indiana Baptist Education Society, and the Indiana State [Baptist] Convention.[17] In the admiring words of William Cathcart's 1883 *Baptist Encyclopedia*,

> In 1834 he was ordained, and thus entered upon a work that his soul longed to engage in. So unsullied was his public as well as his private life that men were always glad to hear him preach. While traveling the judicial circuit it was no unusual thing for him to address his fellow-citizens on Bible operations, missions, Sabbath-schools, general

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FROM ABE LINCOLN TO ABBIE HOFFMAN (Northwestern Univ. Press 2002); THE FIRST DUTY: A HISTORY OF THE U.S. DISTRICT COURT FOR OREGON, U.S. DISTRICT COURT OF OREGON HISTORICAL SOCIETY (Carolyn Baun ed., 1993).

16. The parameters of this debate owe much to two defining works of scholarship: ALICE FELT TYLER, FREEDOM'S FERMENT: PHASES OF AMERICAN SOCIAL HISTORY TO 1860 (Univ. of Minnesota Press 1944), and DANIEL BOORSTIN, THE AMERICANS: THE NATIONAL EXPERIENCE (Rosetta Books 1965).

17. A very detailed Holman obituary appears in the IND. ST. SENTINEL, Aug. 31, 1842.

> education, and temperance. So consistent and earnest was his life that there seemed no incongruity, but rather a singular harmony in his two offices of judge and minister.[18]

Little wonder that, again in Cathcart's words, "He, like his father, was an emancipationist,"[19] or that his sentencing of a coach driver for mail theft should have the ring of the pulpit about it. Holman was clearly a nineteenth century reformer with a powerful moral emphasis.

But was Holman typical of those who sat on the antebellum federal bench in Indiana? To start to answer that, let's compare him to his predecessor, Benjamin Parke. Born in New Jersey in 1777, and trained in a Lexington, Kentucky, law office, Parke emigrated to Vincennes, Indiana Territory, in the winter of 1800-1801. He became an early and close associate of Governor William Henry Harrison. Parke's progress was quick. He became territorial attorney general in 1801, territorial delegate in 1805, territorial judge in 1808, and militia cavalry captain during the 1811 Tippecanoe campaign. Interestingly, he remained a viable presence even after the Vincennes/ Knox County faction began to lose power to the Whitewater/Jennings faction after 1810. In 1816 Parke was named United States District Judge with accompanying circuit authority.[20]

Parke's eulogist, his close friend Charles Dewey, attributed the Judge's survival and success to Parke's calm and deferential manner.

> His decisions, though generally the result of correct, and often of profound learning, clear discrimination, and conclusive reasoning, were yet delivered with so much humility—so much diffidence of his own powers—with so evident an anxiety to do right—in fine, so gentle, courteous, and kind was his whole intercourse with the bar, that at one and the same moment, we yielded our admiration to the judge and our love to the man.[21]

Andrew Cayton, a modern scholar with a special interest in the Vincennes community, sees Parke's accomplishment as a matter of reputation.

> Men such as Parke jealously guarded their reputation because they had to. If the charge of hypocrisy or deception stuck, their career was over. In a personal political culture, one's honor, the security that one's word was bond, was the most important currency of all.[22]

If one adds his eight years as an Article IV territorial judge to his nineteen of service as an Article III District judge, it makes Parke the longest serving federal judge of the nineteenth century. It certainly gave him time to define his approach

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18. WILLIAM CATHCART, THE BAPTIST ENCYCLOPEDIA 535-36 (Louis H. Everts ed., 1883).

19. *Id.* at 535.

20. WILLIAM WOOLLEN, BIOGRAPHICAL AND HISTORICAL SKETCHES OF EARLY INDIANA 384-90 (Hammond & Co. 1883).

21. CHARLES DEWEY, AN EULOGIUM UPON THE LIFE AND CHARACTER OF THE HON. BENJAMIN PARKE 15 (Bolton & Livingston 1836).

22. CAYTON, *supra* note 14, at 236.

to the bench and community.

In many ways, Parke is a contrast to Holman. Where Holman was a man of organized publicly proclaimed faith, Parke has the look of a privately motivated seeker. Charles Dewey, Parke's frequent traveling companion, put it this way:

> [H]e made no public profession of his faith, and entertained towards the intolerance of sectarian feeling an utter abhorrence . . . . Uninfluenced by human authority and the dogmas of teachers, he held himself responsible to his God alone for the exercise of those powers and faculties which he had bestowed upon him, and left others to account for themselves.[23]

William Woollen quoted Parke's friend Barnabas Hobbs, who phrased it thus:

> Benjamin Parke was a Christian in the true acception of the term, though he identified himself with no religious denomination . . . . He very often rode out three miles into the country to sit in silence with the Friends at their midweek meetings . . . .[24]

Where Holman was a man of morality, Parke was a man of mentality. Parke's community interests were centered upon secular education and access to the printed word. He was a founder of the Salem Academy for young men, an organizer of the first law library in the state, and a founding member of the Indiana Historical Society. Like the patrician leaders of Knox County with whom he started his career, Parke sought to train and shape leaders for an emerging polity.[25]

Their differing voices on slavery attract us. Where Holman is known for *In re Clark*, Parke left us his 1818 opinion *In re Susan*, which involved a Kentucky slave owner's attempt to recover Susan, "a fugitive from labour [sic]."[26] The case had already been heard in the state courts, which had followed the more complicated procedures for recovery under state law rather than those of its federal counterpart, the 1793 Fugitive Slave Act. Now it came before Parke where Susan's attorney argued those state laws took precedence over federal statute. Parke rejected the argument, after noting it was "the first occasion on which the validity of this law [the Fugitive Slave Act] has been questioned."[27] State recovery laws, he suggested, were an artifact of an era before the Constitution gave power on the issue to Congress.

> In the formation of the constitution of the United States, the states parted with this authority, and devolved it upon the general government, and it is a privilege secured to the people of the states, respectively, to seek redress before the tribunals, in the mode designated by congress.[28]

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23. DEWEY, *supra* note 21, at 15.

24. WOOLLEN, *supra* note 20, at 389.

25. A useful Parke obituary appears in the W. SUN & GEN. ADVERTISER (Vincennes), Aug. 8, 1835. *See also* WOOLLEN, *supra* note 20, at 385-86, 390.

26. 23 F. Cas. 444, 444 (C.C. Ind. 1818).

27. *Id.* at 445.

28. *Id.*

That standard having been met, Susan was returned to Kentucky.

Four other individuals served as district judge in the first five decades of the District Court, and together they allow us to explore further the patterns of justice in their era. These were Elisha Mills Huntington, judge from 1842 to 1862, and the three Civil War judges, Caleb Blood Smith, 1862 to 1864, Albert Smith White, 1864, and David McDonald, 1864 to 1869.

If one wants to be strict about appointments, one could add Charles Dewey, Parke's friend and ultimately his eulogist, who was nominated by President John Tyler and confirmed by the United States Senate in 1842. But Dewey promptly declined the appointment—perhaps because he preferred the higher $1500 salary he earned as a Justice of the Indiana Supreme Court to the mere $1000 of a federal district judge.[29]

We know less about the values and ideas that underlay the decisions of the later judges than we do for Parke and Holman. All four built careers incorporating political involvement, but only Caleb Smith is today remembered primarily for his political activities. Their political styles varied.

Elisha Huntington was, like Charles Dewey, appointed by President John Tyler after a cursory review that probably rested upon Huntington's reputation and the approval of the state's two senators.[30] The Judge proved to be a unionist who sought sectional reconciliation and in 1860 privately criticized Lincoln for "his foolish twaddle about Emancipation."[31]

Smith, White, and McDonald were all Lincoln appointees who expressed support for aspects of the Lincoln war effort, although their terms were among the shortest ever served in the Southern District's history.

Caleb Smith was a major player on the Indiana delegation to the 1860 Republican convention, helping to secure Lincoln's nomination, and was of course Secretary of the Interior in the first Lincoln cabinet.[32] Smith left the Cabinet in 1862 after he stated in a letter to Lincoln that he had developed a "functional derangement of the heart." He then sought the vacant judgeship because "The duties of the position are adapted to my tastes and habits and are sufficiently light be performed without inconvenience."[33] Justice David Davis may have been closer to the mark when he suggested Smith was dissatisfied with Lincoln's managerial style.[34]

Albert Smith White was a former Whig Senator from Indiana who returned to Congress as a Republican during Lincoln's first term. In Congress, White

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29. LEANDER MONKS, COURTS AND LAWYERS OF INDIANA 199 (1916); EMILY VAN TASSEL, WHY JUDGES RESIGN: INFLUENCES ON FEDERAL JUDICIAL SERVICE, 1789 to 1992, at 13 (1993).

30. *Proceedings in the United States Court in Memory of the Late Judge Huntington*, DAILY ST. SENTINEL (Indianapolis), May 11, 1863.

31. Letter from Elisha Huntington (Sept. 9, 1862) (preserved in Huntington Manuscript Collection (bound letters volume), Lilly Library, Indiana University).

32. Smith's obituary appears in the DAILY J. (Indianapolis), Jan. 9, 1864.

33. Letters from Smith to Lincoln (Nov. 12, 1862) (preserved in Library of Congress Presidential Documents Collection, Microfilm Reel No. 43, N. 19514).

34. WILLARD KING, LINCOLN'S MANAGER: DAVID DAVIS 204 (Harvard Univ. Press, 1960).

championed many of President Lincoln's early plans, and chaired a committee exploring gradual emancipation and colonization.[35]

David McDonald is remembered primarily for his legal activities—which included serving as a founding professor at the Indiana University Bloomington law school, and writing a text instructing justices of the peace in their duties and procedures. He had sought the appointment since 1862, and succeeded on his third attempt. McDonald kept a candid and detailed diary recording his path to appointment, including an interview with Lincoln, but spoke almost entirely upon party matters and made little mention of the reputation he had gained in his legal activities. Ill health also limited him after 1866.[36]

Their connections to reform varied. Huntington's wife was a champion of genteel feminism who led the women's campaign to thank Robert Dale Owen for his actions advocating women's independent right to property in the 1850 Indiana State Constitutional Convention.[37] Huntington himself was a vigorous critic of abolitionism, as he evinced in one of his 1851 grand jury charges regarding enforcement of the 1850 Fugitive Slave Act:

> Evil passions seem to have been let loose, and madness, in some sections of the country, seems to rule the hour . . . .
>
> [T]he raising a body of men to obtain by intimidation the repeal of a law, or to oppose and prevent, by terror, its execution, is levying war against the government . . . .
>
> We must stand by the rights of others as we stand by our own. We must observe the laws and we must enforce their observances where they are resisted—we must keep faith not only with each other, but with the citizens of other States.[38]

None of the three Civil War judges offered strong expressions about reform while on the bench. We could, of course, argue that by maintaining the rule of law in wartime they were forwarding the reform agenda of the Northern government, and Smith is certainly remembered for his actions in trying draft resisters. Ill health denied White any real chance to speak out during his brief eight-month tenure on the bench, and left most of his cases on the docket for his successor. David McDonald is, of course, best remembered because, in his circuit authority, he joined with Supreme Court Justice David Davis, also excising circuit power, to draft the certification that sent *Ex parte Milligan* to the Supreme Court.

The attitudes of these four judges to the sources of inspiration and morality also varied. Huntington probably expressed his attitude best in a letter to his

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35. See obituaries in INDIANAPOLIS GAZETTE, Sept. 5,1864, and INDIANAPOLIS J., Sept. 6, 1864.

36. Flora McDonald Ketcham, *David McDonald*, IND. MAG. HIST., 1932, at 180-87.

37. Thomas James de la Hunt, *Judge Elisha Mills Huntington*, IND. MAG. HIST., 1927, at 120-21.

38. INDEP. PRESS (Lawrenceburg), Nov. 29, 1851.

sister Louisa Rudd in 1843 in which he described a day on the bench during the trial of a postmaster of Indianapolis:

> one of the three counsel employed by the prisoner is now speaking. For one long hour he has been raving like a Methodist preacher until all the ideas he ever had seem to have escaped. The old clock above my head and the descending sun whose glorious beams now flash from the horizons reddened line through the lofty columns of this beautiful hall, admonish me that night will soon close in and shortly relieved me from this most unconstitutional infliction.[39]

Smith and White, when evaluated by their contemporaries, were often described as orators and former railroad presidents—suggesting, perhaps, a greater respect for enterprise than for inspiration. White, in fact, was the first judge in Indiana to have his remains transported by train—and the only one to have the vibration of a train cause his coffin to collapse.[40] McDonald, on the other hand, brought probably the most unusual extralegal source of inspiration of any jurist who has sat on the Indiana District court. Consider this section of his obituary from the *Richmond Palladium*.

> In his later years he gave much thought to the subject of 'Spiritualism,' and was a complete convert to the doctrine of the presence and action of the spirits of the departed in our present visible life. He . . . expressed his entire faith in the spiritual origin of certain phenomena exhibited by the mediums, thus affording another illustration of the truth that the extreme of infidelity is far more apt to change to the extreme of credulity, when it changes at all, than it is to the moderate convictions of a judgment that has never been shaken.[41]

One may judge whether to credit a report in *Indianapolis Journal* that McDonald even communicated with six persons in full daylight the day after his demise by writing a message in his handwriting on a slate.[42]

Three conclusions seem warranted. First, there are ample sources available for the early history of the United States District Court for the Southern District of Indiana—sources that capture both the substance and the personality of that era. Second, there was remarkable diversity among the first six judges of the court, both in the content of their opinions and in the sources of their values and beliefs. But third, the great issues of moral reform that transformed antebellum America were heard by those judges, and the District Court's history is in part a history of its responses to the issues raised in an era of moral reform.

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39. Letter from Huntington to Louisa Rudd (Nov. 30, 1843) (preserved in Huntington Manuscript Collection, Lilly Library, Indiana University).

40. IND. J., Sept. 9, 1864.

41. RICHMOND PALLADIUM, Aug. 31, 1869.

42. INDIANAPOLIS J., Aug. 31, 1869.

JUDICIAL FEDERALISM IN THE SOUTHERN DISTRICT

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INTRODUCTION

The role of the federal judiciary in the American legal system has undergone profound change during the 100 years the United States District Court for the Southern District of Indiana has done its business in the new courthouse. The ratification of the Fourteenth Amendment and the Judiciary Act of 1875, which gave the district courts federal question jurisdiction, signaled a new role for the federal judiciary, and the federal courts became increasingly involved with questions concerning the scope and role of the federal government's involvement in the political, economic, and social life of the United States.[1] When the Courthouse was built, however, the business of the federal courts was still primarily the resolution of private disputes between citizens of different states.

Professor Felix Frankfurter said in 1928 that with the creation of federal question jurisdiction, the federal courts "ceased to be restricted tribunals of fair dealing between citizens of different states and became the primary and powerful reliances for vindicating every right given by the Constitution, the laws, and treaties of the United States."[2] Frankfurter's statement proved to be prophetic, but about 25 years premature.

With the arrival of the Warren Court in 1953, Frankfurter's vision became a reality. *Brown v. Board of Education*,[3] began a period of dynamic development of federal constitutional law which redefined the relationship between individuals and the government and the federal judiciary became the enforcer of the newly identified limitations on government power. This new, rapidly developing federal public law presented many challenges to the judges of the Southern District. The Supreme Court opinions established broad new principles of constitutional law but in the Southern District of Indiana, and across the country, it was left to the district courts to adapt the new constitutional principles to local conditions.

This Article will discuss two areas, school desegregation and prison reform. The district court managed major class action litigation during a period in which the law was very unpredictable. This discussion will demonstrate that prior to *Brown*, the Constitution of the United States was interpreted in such a way that

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1. The trend, however, began only in the early Twentieth Century, three decades after passage of the Judiciary Act of 1875. Sampling cases every five years, Solomon found that "by 1902 the private law cases had reached a high of 96.8% of the total cases decided" by the Seventh Circuit. RAYMOND L. SOLOMON, HISTORY OF THE SEVENTH CIRCUIT 1891-1941, at 160 (1981).

2. FELIX FRANKFURTER & JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 65 (Johnson Reprint ed. 1972) (1928).

3. 347 U.S. 483 (1954) [hereinafter Brown I].

the federal judiciary was not involved in these two insidious social problems. The Warren Court brought the federal courts into both areas in a big way. The zenith of judicial power in the control of local institutions in the southern district may have been in 1973 when Hon. S. Hugh Dillin appointed two commissioners to exercise some of the power of the Board of School Commissioners of the Indianapolis Public Schools.

This new role for the federal courts was short-lived, however, and as the Warren Court gave way to the Burger and the Rehnquist Courts the Court reversed its field and rolled back the constitutional limitations on state officials.[4] Just as the Warren Court acted aggressively to protect the federal constitutional rights of the school children and prison inmates, the Burger and Rehnquist Courts have acted aggressively to reinterpret the constitution in a way that has extricated the federal judiciary from these areas. During all of this transition, the district courts were deciding important cases which had significant impact on large numbers of people without clear direction from the Supreme Court. The expansion and then contraction of the limitations on state officials by the appellate courts meant that the law which the district court judges were expected to apply to challenging social conditions was in a constant state of flux from *Brown* to the turn of the century.

District court judges have the power to interpret and enforce the principles established by the Supreme Court, particularly in times of transition. When the law is settled for a period of time, as it was in these areas before 1954, the law is predictable for citizens, litigants, attorneys, and district courts. When the law is in a period of transition, however, as it was in these areas from 1954 to the turn of the century, the lawyers present new theories and arguments to the district courts to promote or retard the change, and the legal foundation for the decisions of the district court judge is unstable and unpredictable.

The decisions of a district court judge on the merits of the case has an impact on the community regardless of whether the opinion is ultimately affirmed or rejected by higher courts. The district court judge controls the process which creates the record on appeal and factual determinations shape the issues presented to the appellate courts.[5] Beyond the case before the court, the opinions of the district court encourage or discourage litigants from filing new litigation and the opinions provide a context in which other cases are settled. Legislative and executive decisions of state and local governmental officials are no doubt influenced by the decisions of the local federal district court.

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4. Congress contributed to the Court's withdrawal from the enforcement of constitutional limitations. *See, e.g.*, Prison Litigation Reform Act, 42 U.S.C. § 1997 (1980).

5. In spite of a Supreme Court decision that double-celling was not per se unconstitutional, Rhodes v. Chapman, 452 U.S. 337 (1981), Judge Dillin's injunction which prohibited double celling at the Indiana Reformatory was upheld by the United States Court of Appeals for the Seventh Circuit, French v. Owens, 777 F.2d 1250 (7th Cir. 1985); the same court reversed a district court decision which enjoined double-celling at Illinois' Pontiac Correctional Center. Smith v. Fairman, 690 F.2d 122 (7th Cir. 1982).

I. SCHOOL DESEGREGATION

The new era in federal jurisprudence was ushered in dramatically when the newly-installed Chief Justice Earl Warren wrote the opinion in *Brown v. Board of Education*,[6] for a unanimous Court. In its brief opinion (less than eight pages in the Supreme Court Reporter) the Supreme Court threw out the well-settled doctrine of "separate but equal," and replaced the certainty of that precedent with far-reaching questions about both the scope and substance of constitutional requirements and the procedures by which the courts would provide for wholesale change. The Court found that "[s]eparate educational facilities are inherently unequal," and therefore racial segregation in public education violated the Fourteenth Amendment.[7] Recognizing "the wide applicability of this decision," the Court ordered reargument on the issue of relief, and invited the Attorney General and the Attorneys General of states with segregated schools to participate.[8]

Following reargument, the Supreme Court remanded the three federal cases back to their originating federal district courts to remedy the segregation found unconstitutional in *Brown I*.[9] It recognized that, in fashioning remedies, the district courts would need to invoke their broad equity powers.[10] In doing so, the Court said, the lower courts

> may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving [the constitutional violations].[11]

Although it endeavored to give guidance to the lower courts in fashioning remedies, the Court in *Brown II* raised many more questions than it answered about the nuts and bolts of desegregating segregated school systems. Those questions were left to the district courts to resolve as they forged ahead into the new area of school desegregation.

The complaint filed on May 31, 1968 by the United States Department of Justice against the Board of School Commissioners of the City of Indianapolis, Indiana brought the District Court for the Southern District of Indiana into the process of developing school desegregation law in the face of constantly evolving appellate court precedent. The case was one of the first so-called Northern desegregation cases brought by the Department of Justice against school districts in which segregation was perpetuated despite being officially discarded, and it

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6. *Brown I*, 347 U.S. at 483.
7. *Id.* at 495.
8. *Id.*
9. Brown v. Bd. of Educ. of Topeka, 349 U.S. 294, 299 (1955) [hereinafter Brown II].
10. *Id.* at 300.
11. *Id.* at 300-01.

was one of the first to impose an interdistrict remedy for the violation. Judge S. Hugh Dillin faced not only novel substantive and procedural issues, but also became intimately involved in social and educational decisions far outside the traditional realm of the district court. In applying the theory of *Brown* to the day-to-day life of every student in the Indianapolis Public Schools, the district court became the engine driving the quickly developing law of school desegregation.

Before 1949, Indiana schools were segregated by law. During the 1948-49 school year, only five percent of elementary school children in the Indianapolis Public Schools attended racially mixed schools.[12] Following the passage of a state law requiring phased desegregation in 1949, little changed in the Indianapolis schools. Both because of residential segregation and purposeful acts of the Indianapolis Public Schools, the school system remained largely segregated.[13]

In March 1967, a black parent whose children attended Indianapolis public schools filed a complaint with the United States Department of Justice challenging the segregated school system.[14] The Department of Justice investigated, and, finding a violation of equal protection, notified the school board that it would file suit unless it took corrective action by May 6, 1968.[15] When the Board proposed only a voluntary transfer program for teachers, the Department of Justice filed its complaint in the district court.

Although the Board denied any improper segregation, the litigation began in the spirit of compromise. The case was divided into three components: first the desegregation of faculty and staff, next the desegregation of the high schools, and finally the desegregation of elementary schools.[16] Judge Dillin mediated the parties' negotiations on the desegregation of teachers, and a settlement was reached in July 1968.[17] Although it was not without controversy,[18] the plan was implemented for the 1968-69 school year. The Board then turned to desegregation of the high schools and proposed that it integrate the high schools by closing the city's two black high schools, Crispus Attucks and Shortridge, and busing the black students to the remaining nine high schools, which were predominately white.[19] The Board's proposal drew ire from disparate voices in the community, and was ultimately abandoned. With it, the Board abandoned

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12. United States v. Bd. of Sch. Comm'rs, 332 F. Supp. 655, 665 (S.D. Ind. 1971) [hereinafter Indianapolis I].

13. *Id.* at 666.

14. William E. Marsh, *The Indianapolis Case: United States v. Board of School Commissioners*, *in* LIMITS OF JUSTICE: THE COURTS' ROLE IN SCHOOL DESEGREGATION 314 (Howard I. Kalodner & James F. Fishman eds., 1978).

15. *Id.*

16. *Id.* at 317.

17. *Id.*

18. The Indianapolis Education Association filed suit in state court alleging that the settlement, which included mandatory transfers, violated teachers' due process rights. Although the suit was not successful, the teachers did have input into the implementation of the plan.

19. Marsh, *supra* note 14, at 319.

hope that the matter could be resolved without the court's direct involvement.

This set the stage for the trial of *United States v. Board of School Commissioners*, which began on July 12, 1971, and focused on whether the Board had committed a constitutional violation in operating a segregated school system.[20] Judge Dillin concluded that it had. He found that the Board had perpetuated a dual school system for black and white students through the use of optional attendance zones in racially mixed areas,[21] construction of new schools,[22] in the assignment of special education classes,[23] and in its general choice of techniques for alleviating school overcrowding.[24]

After identifying overt acts by which the Board perpetuated the dual school system, Judge Dillin found that "various factors not of its own making have contributed" to maintaining segregation in the schools.[25] He considered demographic changes that had increased the number and proportion of blacks in the IPS area and housing policy that perpetuated those changes by situating low-income housing, with predominantly or exclusively black residents, within IPS rather than in the surrounding suburban school districts. Judge Dillin also raised questions about the constitutionality of the Uni-Gov Act, by which the Indiana General Assembly had expanded the borders of the City of Indianapolis to be coterminous with the borders of Marion County, and expressly excepted the school corporations within Marion County from the Act.[26] Prior to Uni-Gov IPS had the power to expand its territory as the City of Indianapolis expanded, but this statute froze the boundaries of IPS by precluding future annexation. As of 1970, Center Township, which includes most of the original City of Indianapolis

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20. 332 F. Supp. 655, 656 (S.D. Ind. 1971).

21. *Id.* at 668. "White students in optional zones almost always attended white schools." *Id.*

22. *Id.* Judge Dillin found that

> new elementary schools to be attended by students of predominantly one race have been constructed adjacent to schools attended primarily by students of the opposite race, new middle schools have been constructed to enroll the students of one race adjacent to schools attended by students of the opposite race, and new high schools have been located and constructed where they have served predominantly white student populations.

Id. at 668-69.

23. *Id.* at 669.

24. *Id.* at 667.

> The defendant Board has constructed numerous additions to schools since 1954; more often than not the capacity thus created has been used to promote segregation. It has built additions at Negro schools and then zoned Negro students into them from predominantly white schools; it has built additions at white schools for white children attending Negro schools; it has generally failed to reduce overcrowding at schools of one race by assigning students to use newly built capacity at schools of the opposite race.

Id.

25. *Id.* at 672.

26. *Id.* at 676.

and most of IPS, was 38.8% black. Excluding Center Township, Marion County, by contrast, was 97% white.[27] This raised the question of whether Uni-Gov was unconstitutional as tending to increase segregation in the public schools of Marion County.[28]

Judge Dillin held that the IPS schools were unconstitutionally segregated.[29] Judge Dillin recognized immediately that a remedy which was what he called a "massive 'fruit basket' scrambling of students within the School City" could at least temporarily eliminate segregation in IPS, but "in the long haul, it won't work."[30] A long term solution to segregation in the IPS schools would need to acknowledge and address the many factors that went into perpetuating segregation. To move forward to the remedy stage, Judge Dillin posed specific questions to the parties regarding Uni-Gov and the possibility of a remedy encompassing not only IPS, but the surrounding districts as well.[31] He ordered that the Justice Department bring the surrounding school districts and the State of Indiana into the litigation as defendants, and told both sides to bring in other parties necessary to fashion a remedy and encouraged other interested parties to move to intervene on their own.[32] In the interim, Judge Dillin ordered immediate measures directed towards the creation of a unitary school system.

Less than two weeks after Judge Dillin delivered his opinion, the Board voted to appeal the order to the Seventh Circuit, but decided not to seek a stay pending appeal.[33] The Seventh Circuit affirmed, concluding that "this case was tried to a judge who obviously gave it considerable conscientious thought and attention and by able counsel on both sides," and that the findings of fact supported the conclusion that "during much of the period from 1954 to 1968 the Board continued affirmative policies which promoted a dual system, and that last-minute efforts have been totally insufficient to eliminate the consequences of those yeas of discrimination."[34]

Less than five months after the Seventh Circuit affirmed Judge Dillin's finding of a violation, he convened the remedy trial on June 12, 1973.[35] Pursuant to the court's order in *Indianapolis I*, a number of new parties were added on both sides of the caption. As ordered, the Justice Department served the surrounding school districts, including the non-IPS Marion County school districts, two Municipal School Districts within Marion County, and two school

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27. *Id.* at 672.
28. *Id.* at 679.
29. *Id.* at 665.
30. *Id.* at 678.
31. *Id.* at 679.
32. *Id.* at 679-80.
33. Marsh, *supra* note 14, at 329.
34. United States v. Bd. of Sch. Comm'rs, 474 F.2d 81, 89 (7th Cir. 1973).
35. Marsh, *supra* note 14, at 335. The added school defendants objected to the term remedy trial, insisting that no remedy could be imposed against them because they had not been found guilty of a constitutional violation.

districts serving suburbs of Indianapolis in adjoining counties.[36] Because the government did not allege any acts of *de jure* segregation against the added defendants (it simply served them with a summons and a copy of the court's order in *Indianapolis I*), the parents of two black IPS students moved to intervene as plaintiffs on behalf of all school-age children in IPS. Their petition was granted, and they subsequently added additional state defendants.[37] The trial raised challenging procedural issues, not the least of which was how to administer a trial when the defendants were represented by at least twenty-five different attorneys.[38]

Judge Dillin concluded that his fears, expressed in *Indianapolis I*, that a remedy affecting only IPS would result in resegregation of the Indianapolis schools, were well founded.[39] He found that "when the percentage of Negro pupils in a given school approaches 25% to 30%, more or less, in the area served by IPS, the white exodus from such a school district becomes accelerated and continues," and that "once a school becomes identifiably black, it never reverses to white, in the absence of redistricting."[40] Because at the time of the second trial the percentage of black students in IPS had risen above 40%, and continued to rise, a remedy involving only IPS would not eliminate segregation for any significant period of time.[41]

In *Indianapolis II*, Judge Dillin held that the discriminatory acts of IPS found to be a constitutional violation in *Indianapolis I* could be imputed to the State of Indiana, which under Indiana law was ultimately responsible for education.[42] Citing to the decision of the Sixth Circuit in *Bradley v. Milliken*[43] (the Detroit desegregation case), the court concluded that a multi-district remedy was appropriate because the state controlled education through its instrumentalities and had allowed IPS to maintain a dual school system through its acts and omissions.[44] Further, because no desegregation plan involving IPS alone would be effective in remedying the constitutional violation, "[I]f we hold that school district boundaries are absolute barriers to an IPS school desegregation plan, we would be opening a way to nullify *Brown v. Board of Education*."[45] Judge Dillin relied on extensive demographic and geographic information in concluding that the appropriate remedy should involve all of the Marion County defendants and

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36. *Id.* at 330.

37. United States v. Bd. of Sch. Comm'rs, 368 F. Supp. 1191, 1995 (S.D. Ind. 1973) [hereinafter Indianapolis II].

38. Marsh, *supra* note 14, at 335. "The large number of lawyers complicated the proceeding, particularly in such matters as authenticating evidence. The lack of clear controlling principals of resulted in the introduction of a great deal of essentially immaterial evidence." *Id.*

39. *Indianapolis II*, 368 F. Supp. at 1197.

40. *Id.*

41. *Id.* at 1198.

42. *Id.* at 1205.

43. 484 F.2d 215 (6th Cir. 1973).

44. *Indianapolis II*, 368 F. Supp. at 1205.

45. *Id.* at 1206.

some of school districts directly adjoining Marion County.[46]

Having determined that an inter-district remedy was both necessary and appropriate, Judge Dillin postponed devising a judicial remedy. Instead, he gave the Indiana General Assembly "a reasonable time" in which to devise and implement its own remedy. In the interim, the court ordered measures that included transfers of black IPS students to each of the metropolitan school districts.[47]

Soon after he handed down his opinion, Judge Dillin stayed the portions of his order that required busing to the metropolitan school districts for the 1973-74 school year.[48] He gave IPS one week to submit a plan to meet certain objective criteria, including ensuring that no elementary school would have less than 15% black students and balancing the racial make-up of Shortridge and Howe High Schools.[49] IPS submitted a proposed plan that met none of the criteria, and Judge Dillin found that IPS was in default of his order in *Indianapolis II*.[50]

On the motion of the intervening plaintiffs, Judge Dillin appointed two court commissioners to formulate an interim plan for the 1973-74 school year.[51] In addition to requiring that IPS provide office space and support to the commissioners, Judge Dillin ordered that the Board defendants "assign their professional planning staff wholly to the services of the Commissioners" until they had completed their interim plan.[52] In this remarkable order, the court effectively removed planning authority from the Board and vested it in two outside experts.

Although the commissioners worked feverishly to develop an interim plan with only fifteen days before the first day of school, the Indiana General Assembly failed to act. Judge Dillin issued a supplemental opinion in December 1973, in which he clarified his earlier requirement that the General Assembly act within "a reasonable time" and proposed possible solutions; no metropolitan plan was introduced in the legislature.[53]

In the meantime, *Milliken v. Bradley*, which Judge Dillin had relied on in fashioning his multi-district remedy, had reached the Supreme Court. On July 25, 1974, the Court reversed the Sixth Circuit and held against a multi-district remedy in Detroit.[54] Soon thereafter, the Seventh Circuit reversed Judge Dillin's order of a multi-district remedy in light of the fact that there had been no finding

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46. *Id.* at 1207 (concluding that including some of the defendant school districts outside of Marion County would be impractical, and therefore did not recommend that those districts be involved in a metropolitan plan).

47. *Id.* at 1231.

48. Marsh, *supra* note 14, at 343.

49. *Id.* at 344.

50. *Id.*

51. *Id.*

52. *Id.* at 345 (quoting Order of Judge Dillin in United States v. Bd. of Sch. Comm's, entered August 27, 1973, at 4-5).

53. *Id.* at 348.

54. Milliken v. Bradley, 418 U.S. 717 (1974).

that the suburban districts had committed acts of de jure segregation.[55] The court remanded for a determination of whether Uni-Gov, and the purposeful exclusion of the school districts from Uni-Gov, supported the imposition of a multi-district remedy within Marion County.[56] In the same opinion, Judge Dillin's appointment of the commissioners to create an interim plan was affirmed.

On remand, Judge Dillin again found that an inter-district remedy within Marion County was warranted.[57] The commissioners completed their interim plan, were released from service, and IPS's planning functions were returned to the Board. Following additional appeals, the inter-district remedy was finally implemented in 1981, more than fourteen years after the Justice Department had filed suit. The supervision of the district court continued for another seventeen years. On June 25, 1998, Judge Dillin found IPS to be a unitary school district, and approved a phase-out of the desegregation plan.[58]

Over the three decades of school desegregation in Indianapolis, the district court faced legal issues as the law was evolving. The district court was both reacting to new precedent as it was handed down from the Seventh Circuit and the Supreme Court and driving these new directions of development by implementing novel solutions to unique issues.

II. PRISON REFORM

When *Brown v. Board of Education* was decided, the federal judiciary had no relationship with state jails and prisons or their inmates. The Eighth Amendment prohibition of cruel and unusual punishment did not apply to the states;[59] and 42 U.S.C. § 1983 had not been recognized as creating a federal cause of action for violation of those constitutional provisions, such as the First Amendment, which were applicable to the states through the Fourteenth Amendment.[60]

The constitutional underpinnings of the prison reform litigation were created when the United States Supreme Court held in 1961 that 42 U.S.C. § 1983 created a private cause of action for violation of the constitutional rights of an individual under color of state law[61] and in 1962, when the Court held that the Eighth Amendment's cruel and unusual punishment clause was applicable to the states through the Fourteenth Amendment.[62] Even those two cases, however, did not immediately open the doors of the federal courthouse to prison inmates. In

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55. United States v. Bd. of Sch. Comm'rs, 503 F.2d 68, 86 (7th Cir. 1974).

56. *Id.*

57. United States v. Bd. of Sch. Comm'rs, 419 F. Supp. 180 (S.D. Ind. 1975).

58. Caroline Hendrie, *In Indianapolis, Nashville, a New Era Dawns*, EDUC. WEEK, July 8, 1998, at 8-9.

59. *See, e.g.*, Adamson v. California, 332 U.S. 46, 78 (1947); *In re* Kemmler, 136 U.S. 436 (1890).

60. *See, e.g.*, Stift v. Lynch, 267 F.2d 237 (7th Cir. 1959).

61. Monroe v. Pape, 365 U.S. 167 (1961).

62. Robinson v. California, 370 U.S. 660 (1962).

1963, the United States Court of Appeals for the Seventh Circuit affirmed the dismissal of a prisoner's § 1983 claim that denying him medical care constituted cruel and unusual punishment. The Seventh Circuit said, "[i]t is not the function of federal courts to interfere with the conduct of state officials in carrying out such duties under state law."[63]

The United States Supreme Court first recognized in 1964 that a state prisoner's complaint that prison officials were depriving him of a constitutionally guaranteed liberty stated a claim upon which relief could be granted. In *Cooper v. Pate*,[64] the Supreme Court reversed a Seventh Circuit decision which upheld the dismissal of the *pro se* complaint of a Black Muslim who alleged that he was being discriminated against because of his religious beliefs in violation of the First and Fourteenth Amendments.[65] The floodgates were not yet open, but the dike was beginning to leak.

The prison reform movement received additional encouragement from the Supreme Court in 1974 when the Court held that the district court correctly refused to abstain in a case challenging, on First Amendment grounds, restrictions on a prisoner's personal correspondence with persons outside the institution.[66] In his opinion for the Court, Justice Powell recognized the federal judiciary's growing recognition of the constitutional rights of prisoners and contemplated the difficult litigation ahead. Justice Powell said,

> Traditionally, federal courts have adopted a broad hands off attitude toward problems of prison administration. . . . Prison administrators are responsible for maintaining internal order and discipline, for securing their institutions against unauthorized access or escape, and for rehabilitating, to the extent that human nature and inadequate resources allow, the inmates placed in their custody. . . . Suffice it to say that the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree. . . . [C]ourts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. . . . Moreover, where state penal institutions are involved, federal courts have a further reason for deference to the appropriate prison authorities.[67]

Despite these cautionary words, law reform lawyers and prison writ writers read the opinion as an invitation to take their grievances to federal court.

Prisoners began the reform litigation in the Southern District of Indiana in November 1975, when four inmates, two black and two white, who worked in the law library at the Indiana Reformatory at Pendleton, filed a class action complaint alleging that the conditions of confinement at the maximum security prison constituted cruel and unusual punishment in violation of the Eighth and

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63. Lawrence v. Ragen, 323 F.2d 410, 412 (7th Cir. 1963).

64. 378 U.S. 546 (1964).

65. *Id.*

66. Procunier v. Martinez, 416 U.S. 396 (1974).

67. *Id.* at 404-05.

Fourteenth Amendments to the Constitution of the United States.[68]

The complaint was assigned to Judge S. Hugh Dillin who dismissed the complaint with leave to file an amended complaint; on May 13, 1976, four days before the twenty-second anniversary of the *Brown* decision, lawyers from the Legal Services Organization in Indianapolis[69] filed the amended complaint which led the judges of the Southern District into the rapidly developing constitutionalization of prisoners' rights and the responsibility of state officials to provide for the needs of the prison inmates.

The theory that conditions of confinement in a state prison could be unconstitutional was first recognized in the South, where prison conditions were the most severe. District Judge Frank M. Johnson, Jr. from the Middle District of Alabama led the way in holding that conditions of confinement could in their totality be a violation of the Eighth Amendment, even if the conditions, taken individually, did not violate the Constitution.[70]

When the *French* case went to trial in July and August 1978, the theory had not been recognized by either the Supreme Court or the Seventh Circuit. For some reason, Judge Dillin did not make a decision in *French* for more than three years after the trial. In March 1982, the case was still under advisement, and the evidence was stale; the court reopened the record and heard additional testimony. By that time, the United States Supreme Court had recognized that "[c]onfinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards."[71] When Judge Dillin decided *French* on May 7, 1982, ten days before the twenty-eighth anniversary of *Brown*, conditions of confinement at the prison were worse than they had been when the case was first tried in 1978. For example, "[t]he number of inmates housed in the Reformatory in August, 1978 was 1,215. By January 27, 1982 it had risen to 1,972."[72]

Judge Dillin held that the conditions of confinement at the Indiana Reformatory constituted cruel and unusual punishment and issued a comprehensive remedy, one which would be beyond the wildest imagination of prison reform advocates in 2004.[73] The court ordered a phased reduction in the

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68. French v. Owens, 538 F. Supp. 910 (S.D. Ind. 1982).

69. William E. Marsh was one of the Legal Services Organization lawyers who represented the plaintiffs from 1976 to 1994.

70. *See* Pugh v. Locke, 406 F. Supp. 318 (M.D. Ala. 1976), *aff'd,* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977).

71. Hutto v. Finney, 437 U.S. 678, 685 (1979).

72. *French*, 538 F. Supp. at 913.

73. *Id.* at 927-28 (ordering the defendants to hire a new doctor, add other medical and mental health personnel, and develop new procedures for the delivery of medical care; provide substance abuse and mental health counseling for all inmates who need and want them; the Maximum Restraint Unit, which had been used for disciplinary segregation, was ordered closed; provide additional recreation time for all inmates; submit to the court a plan for hiring additional correctional officers in order to provide a safe environment for the inmates; give each inmate an educational, vocational, or job assignment; and bring all work locations into compliance with

population from more than 2000 at the time of the decision to 1375 twenty months later, along with an elimination of double-celling in the cell houses and double bunking in the dormitories.[74] The order came in spite of two Supreme Court decisions which reversed district court decisions eliminating double-celling or double-bunking.[75] Judge Dillin held that the overall conditions of confinement were significantly harsher at the Indiana Reformatory than at the prisons in those two cases.[76]

An intriguing federalism issue was presented when Judge Dillin held that the conditions at the Indiana Reformatory were in violation of numerous Indiana statutes, and in an exercise of pendent jurisdiction, ordered the defendants to come into compliance with the state law.[77] Judge Dillin ordered that the kitchen and dining room be brought into compliance with standards of the Indiana Board of Health and that all buildings which required structural changes be brought into compliance with the standards of the office of the Indiana State Fire Marshal.[78]

While the appeal to the court of appeals was pending, the United States Supreme Court held that the Eleventh Amendment does not permit a federal court to compel state officials to follow state law.[79] Following a remand from the Seventh Circuit for reconsideration in light of *Pennhurst*, Judge Dillin held that most of the conditions which violated Indiana law were also in violation of the Eighth Amendment and entered essentially the same order on Eighth and Fourteenth Amendment grounds. The Seventh Circuit upheld the amended order as to the kitchen and dining room but vacated the enforcement of Fire Marshal standards, as well as the OSHA requirement.[80]

For more than a decade the case produced repeated flare-ups of litigation. Attorneys for the plaintiffs regularly filed contempt petitions asserting that the defendants were not complying with the district court's orders and the defendants filed numerous petitions to modify the injunction. The ultimate demise of the case came in a landmark United States Supreme Court decision[81] which upheld the constitutionality of the Prison Litigation Reform Act of 1995 (PLRA).[82]

Occupational Safety and Health Administration standards. A preliminary injunction against the use of mechanical restraints, which had been issued during the pendency of the litigation, was made permanent.).

74. *Id.* at 910.

75. Rhodes v. Chapman, 452 U.S. 337 (1981); Bell v. Wolfish, 441 U.S. 520 (1979).

76. *French*, 538 F. Supp. at 910.

77. *Id.*

78. *Id.*

79. Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89 (1984).

80. French v. Owens, 777 F.2d 1250, 1257 (7th Cir. 1985) (holding that "The eighth amendment does not constitutionalize the Indiana Fire Code. Nor does it require complete compliance with the numerous OSHA regulations."). The Seventh Circuit also vacated the injunction regarding recreation for all inmates and programs for persons in protective custody. *Id.* at 1251.

81. Miller v. French, 530 U.S. 327 (2000).

82. 18 U.S.C.A. § 3626 (1995).

The statute provided that any prospective relief ordered in a prison conditions case, such as the district court injunction in *French*, would be terminable upon the motion of any party two years after the injunction was entered, and required "[t]he court [to] promptly rule on any motion to modify or terminate prospective relief in a civil action with respect to prison conditions."[83] If a judge does not rule on the motion to modify or terminate the injunction within thirty days the prospective relief ordered is automatically stayed.[84]

In June 1997, the defendant Indiana Department of Corrections officials filed a motion in the district court to terminate the prospective relief Judge Dillin had ordered in the case. Pursuant to a motion of the plaintiffs, Judge Dillin held that the automatic stay provision was an unconstitutional violation of separation of powers; the Seventh Circuit affirmed.[85] The United States Supreme Court reversed.[86]

The Supreme Court construed the statute as precluding the district court from enjoining the automatic stay provision of the PLRA and then held that the automatic stay provision was not a violation of separation of powers. Upon remand to the district court, the parties agreed that the automatic stay was in effect and entered into an agreement which resulted in the termination of all prospective relief in the case.[87]

CONCLUSION

The last half of the first century in which the United States District Court for the Southern District of Indiana has conducted its business in the courthouse has seen dramatic and dynamic changes in the work of the court. The role of the federal judiciary in solving serious social problems has expanded and contracted, changes which have presented the judges with significant challenges. The judges have responded with courage and integrity, values the new courthouse built in 1904 was no doubt intended to symbolize.

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83. *Id.* § 3626(e)(1).

84. The court can extend this time period for up to sixty days. *Id.* § 3626(e)(2).

85. French v. Duckworth, 178 F.3d 437 (7th Cir. 1999).

86. *Miller*, 530 U.S. at 327.

87. French v. Miller, 234 F.3d 1273, 2000 WL 1180299 (7th Cir. 2000) (unpublished).

THE ROLE OF INDIANA'S STATE AND FEDERAL COURTS IN LEGISLATIVE REDISTRICTING, 1962-2003

A. SCOTT CHINN*

INTRODUCTION

Legislative redistricting, or reapportionment as it is called in some circumstances, holds a number of interests for constitutional scholars and political junkies alike: feuding political parties; separation-of-powers concerns; developing constitutional theories; the intersection of law and statistics; the conflation of Rorschach testing and cartography; and in Texas, where everything is bigger, legislative flight to escape the state's arrest power.[1] But beyond providing interesting theoretical and rhetorical fodder for lawyers and wags, modern congressional reapportionment efforts across the country, for example, have led to fewer and fewer competitive races. In turn, the major political parties have become increasingly partisan as more and more candidates are required to "play to the partisan base," out-of-step with the conventional wisdom that the majority of voters in America are not rabid partisans on either side, but are constituents of a great moderate middle.[2]

Redistricting disputes began to be constitutionalized in 1962. Like many issues that blossomed in the civil rights era of the Twentieth Century, one gets the feeling that, despite continuing trips to the U.S. Supreme Court for elaboration, the great redistricting cases are behind us. State and local governments now largely possess the rules that govern their line-drawing. Unlike ideological "wedge issues" such as abortion and gay marriage that remain to be debated constitutionally and socially in the Twenty-first Century, modern redistricting disputes are almost purely *political*; that is, they are about protecting or wresting control of Congress or state houses, not about resisting craven efforts to disenfranchise citizens based on their race or class.[3] Indeed, in any era, the

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1. Throughout 2003, Democrats in the Texas legislature fought to avoid a Republican congressional reapportionment plan that has been forecasted to create a net gain of three to five seats for Republicans, though there is serious question that such a result would be justified based on current majority-party voting strength among Texans. Natalie Gott, *Texas Senate Gives Tentative Approval to New Congressional Map*, ASSOCIATED PRESS, Sept. 24, 2003; Don Peck & Caitlin Casey, *Packing, Cracking, and Kidnapping*, ATLANTIC, Jan./Feb. 2004, at 50-51. The Texas Democrats twice fled the state to prevent the presence of a quorum for the reapportionment vote. In May, Texas House Democrats fled to Oklahoma, and in July, Senate Democrats fled to New Mexico where they stayed for forty-five days. Gott, *supra*; Rachel Graves & R.G. Ratcliffe, *11 Dems in Exile Wary of Arrest/Want to Know Status of Round 3*, HOUSTON CHRON., Aug. 26, 2003.

2. Peck & Casey, *supra* note 1. In 1962, there were 178 competitive seats out of the 435 total seats in the U.S. House of Representatives. A competitive seat had a victory margin of less than 20% for the successful candidate. In 1982, that number shrank to 138 and to just seventy-nine in 2002. *Id.*

3. *See* Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial*

redistricting process is one of the essential components of politics. It is, after all, perhaps the only governmental function about which elected officials can admit their political motives and public employees are required, instead of forbidden, to work on political matters on government time.[4]

In light of the focus of this symposium on Indiana legal history, this article addresses three topics. First, it briefly reviews how judges got into what we might alternatively call "this mess of redistricting" or "this critical role of causing the political branches to obey the law and constitution." Second, it briefly discusses a number of cases that Indiana state and federal judges have decided and identifies their significances. And finally, it discusses in detail the recent case of *Peterson v. Borst*[5]—the Indiana Supreme Court decision that ended a fight over local legislative redistricting in Marion County, Indiana—from which several conclusions may be drawn about the judicial role in redistricting.

I. THE BEGINNINGS

As anyone who has even casually peeked at a constitutional law text knows, the seminal case signaling the intervention of the federal judiciary in redistricting is the 1962 decision in *Baker v. Carr*.[6] But long before the feat of judicial activism that occasioned *Baker* and its progeny, state courts were obliged by their laws and constitutions to pick up where the political branches of government had left off.[7]

Well before 1962 then, many state courts had jurisdiction by constitutional or legislative direction to resolve redistricting disputes and, in some cases, the obligation to be part of the redistricting process itself.[8] Although that is still true

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Acquiescence to Incumbent-Protecting Gerrymanders, 116 HARV. L. REV. 649, 651 (2002).

> Recently . . . attention in the field [of the Law of Democracy] has shifted from a discussion of rights of participation and political access to an analysis of the background structures and organization of the electoral system. Most notably, the debate has revolved around the desirability of a jurisprudential shift away from rights-based analysis toward an emphasis on electoral competition.

Id.

4. Before the trial in *Peterson v. Borst*, discussed below, the Republican council president admitted that the Republican council redistricting plan favored his party: "Well, we're not about to draw a map to make the Democrats have more districts." Anna Marie Kukec, *Map Flap Endangers Primary*, INDIANAPOLIS STAR, Dec. 15, 2002, at B1.

5. 786 N.E.2d 668 (Ind. 2003).

6. 369 U.S. 186 (1962).

7. *See* J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 6:6 n.24 (Callaghan 1891) (collecting law review articles from late 1950s and early 1960s on remedies for legislative failures in redistricting).

8. *See, e.g.*, Denney v. State *ex rel.* Basler, 42 N.E. 929 (Ind. 1896) (holding Indiana apportionment act of 1895 unconstitutional as violative of the six-year reapportionment period and collecting contemporary cases in which state high courts had exercised jurisdiction over apportionment acts).

today, the state-court decisions rendered before *Baker v. Carr* are better viewed as a collection of idiosyncrasies than an illustration of jurisprudence. To be sure, those cases dealt with questions of malapportionment and equality of representation, as well as other redistricting issues. But despite the established legal role of state courts in legislative redistricting, state courts could also be viewed as part of the problem as opposed to being part of the solution.

Turning to *Baker v. Carr* on this point, the fact that the Tennessee courts had not acted to cure significant voter malapportionment caused by population increases and shifts that had been left legislatively unaddressed for 60 years made the state courts part of the problem.[9] A vote in one Tennessee county could carry as much weight as a eleven votes in another county.[10] Justice Brennan's opinion for the Court held that an equal protection claim under the Fourteenth Amendment could lie in such a case and rejected arguments that legislative reapportionment cases amounted to political questions that were non-justiciable.[11] While dissenting Justices Frankfurter and Harlan were incredulous that federal courts were treading where state courts had not,[12] concurring Justice Clark wanted to go further than Justice Brennan's majority opinion allowed and decide the merits of the equal protection claim on the record before the Supreme Court.[13]

To be fanciful, we might rename *Baker v. Carr* as "Genie v. Bottle" and note that Genie won. Such a characterization seems to support the Supreme Court's decision in *Reynolds v. Sims* two years later.[14] *Reynolds* arose from Alabama, where, like in the Tennessee legislature, districts were malapportioned. The Alabama Supreme Court admitted as much, but would not act to correct it.[15] Thus, under the authority of *Baker v. Carr*, the plaintiffs in *Reynolds* sought federal judicial intervention to require population-based reapportionment. In noting that legislators represent people, and not trees or acres, Chief Justice Warren announced the one-person, one-vote standard as applicable to equal protection challenges to state legislative reapportionment plans.[16] The Chief Justice made clear, however, that the Court was not considering the difficult question of the proper remedy to address the unconstitutional malapportionment.[17] Subsequent malapportionment cases have dealt largely with the formulas and statistical evidence necessary to demonstrate the degree of population difference that is justifiable as a *de minimis* deviation from the unreachable standard of exact equality of voting strength.[18]

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9. 369 U.S. at 191.
10. *Id.* at 255-56 (Clark, J., concurring).
11. *Id.* at 237.
12. *Id.* at 330 (Harlan, J., dissenting).
13. *Id.* at 261 (Clark, J., concurring).
14. 377 U.S. 533 (1964).
15. *Id.* at 540-41.
16. *Id.* at 558, 562.
17. *Id.* at 585.
18. *See, e.g.*, Abrams v. Johnson, 521 U.S. 74, 98 (1997) (affirming district court's

Fast forward in time and concept to gerrymandering. Following *Baker* and *Reynolds*, the Supreme Court decided many cases in the area of racial gerrymandering even where there was no significant population deviation among legislative districts. The notion was that the Equal Protection Clause embraced claims that voters, at least demographically and statistically speaking, had been placed into districts according to their races. Unlike in *Baker* and *Reynolds*, which had been decided under the framework of the general civil rights statute,[19] as a vehicle for bringing an equal protection claim, the Voting Rights Act of 1965[20] vested specific authority in federal courts to determine whether apportionment schemes based on race abridge the right of a class of citizens to elect candidates of their choice. From this line of cases we have the *Gingles* test,[21] which asks judges to determine whether minority voting strength has been impermissibly diluted by reapportionment processes, and we have the rule in *Shaw v. Reno*[22] dealing a certain practical blow to the creation of some majority-minority voting districts—which those on the political left think of as the creation of a "reverse-discrimination claim" in the reapportionment context.[23] And the Court's decision last term in *Georgia v. Ashcroft* appears to have introduced an additional uncertainty in determining whether a new redistricting plan causes "retrogression" in majority-minority districts.[24]

Perhaps the most interesting gerrymandering case from a political science perspective is the Court's decision in *Davis v. Bandemer*.[25] At issue in *Bandemer* was not the basic right of persons to have their vote be weighted equally with fellow citizens or to be free from having their voting rights politically segregated based on race. Rather, the question was whether the Equal Protection Clause embraced a claim of political gerrymandering. The implication was that

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congressional redistricting plan with total deviation of 0.35% and stating that a "court-ordered plan should 'ordinarily achieve the goal of population equality with little more than *de minimis* variation'") (citation omitted); Voinovich v. Quilter, 507 U.S. 146, 161-62 (1993) (remanding state legislative redistricting case to consider whether state policy that favored preserving county boundaries justified total deviation greater than 10%); Mahan v. Howell, 410 U.S. 315, 325-30 (1973) (upholding legislative plan with total deviation of over 16%).

19. 42 U.S.C. § 1983 (2003).

20. *Id.* § 1973.

21. *See* Thornburg v. Gingles, 478 U.S. 30 (1986).

22. 509 U.S. 630 (1993).

23. *See* Conference, *The Supreme Court, Racial Politics, and the Right to Vote:* Shaw v. Reno *and the Future of the Voting Rights Act*, 44 AM. U. L. REV. 1 (1994) (Professor Allan J. Lichtman arguing that the "Republican Party . . . was a party in the *Shaw v. Reno* decision attacking the very majority-minority districts in North Carolina that in their formation the Republican Party had been instrumental in creating").

24. 123 S. Ct. 2498, 2611 (2003). Justice O'Connor's majority opinion remanded the Georgia Senate redistricting plan back to the district court, because, inter alia, the lower court's analysis under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, focused too heavily on the ability of the minority group to elect a candidate of its choice in the majority-minority districts. *Id.*

25. 478 U.S. 109 (1986).

apportionment schemes that dilute votes of persons based on political affiliation may be unconstitutional. The Court's holding that such claims were justiciable[26] brought some familiar refrains about the judicial role. Justice O'Connor's opinion opposing justiciability argued that federal intervention in these cases would "inject the courts into the most heated partisan issues" and could only lead to "political instability and judicial malaise."[27] In 2004, the jury may still be out on the prescience of Justice O'Connor's claim.[28]

This summary of redistricting law is painfully simplistic. But the recent history suggests that what began as a controversial and untethered federal entrée into legislative redistricting in 1962 has, by the beginning of the Twenty-first Century, become—if not "old hat"—at least one of the central things we expect judges to do.[29] In a quantum leap from the route formerly taken by the Tennessee and Alabama Supreme Courts, and further glossing over the irony of states-rights concerns, the federal redistricting cases are now viewed as persuasive precedents for justifying even state judicial intervention in other legislative arenas. This was demonstrated in Indiana jurisprudence last year, when Indiana Supreme Court Justice Theodore R. Boehm's majority opinion based a judicial constraint on geographically special legislation in part on the well worn legal theories that permitted judges to supersede legislative will (or inaction) in the redistricting cases.[30]

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26. *Id.* at 113.

27. *Id.* at 145, 147 (O'Connor, J., dissenting).

28. The 2003-04 term of the U.S. Supreme Court has embraced a significant case claiming that a Pennsylvania federal district court's analysis nullifies the Court's decision in *Davis v. Bandemer*. *Vieth v. Jubelirer*, No. 02-1580, was argued on December 10, 2003, and awaits decision. *See* Veith v. Pennsylvania, 67 Fed. Appx. 95, 2003 WL 21040593 (3d Cir. 2003) (unpublished decision below).

29. *See* Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, "Fair Representation" and an Exegesis into the Judicial Role*, 78 NOTRE DAME L. REV. 527, 528 (2003) ("passive regulation of the political thicket [has given] way to judicial control of reapportionment questions").

30. *See* Mun. South Bend v. Kimsey, 781 N.E.2d 683, 696 n.11 (Ind. 2003).

> *Baker v. Carr* and *Reynolds v. Sims* were regarded as muscular exercises of judicial power forty years ago, but in retrospect are widely accepted as necessary checks on legislative discretion for the very reason that the normal incentives of the legislature to act in the overall public interest are disabled if each individual legislator is benefited by the status quo.

Id. (internal citations omitted). Justice Boehm's experience in this area might be suggestive of his progressive view. He was a law clerk for Chief Justice Earl Warren at the time *Reynolds v. Sims* was decided. Twenty-two years later, he argued the position of the plaintiffs before the Court in *Davis v. Bandemer*. Today, he is a member of the Indiana Supreme Court whose *per curiam* opinion in *Peterson v. Borst* has defined the judicial role in reviewing partisan-initiated redistricting plans in Indiana.

II. INDIANA STATE AND FEDERAL REDISTRICTING DECISIONS

If the cases discussed above loosely establish the legal universe in redistricting, how have our state and federal courts in Indiana traversed it? The leading Indiana state case, or the latest in any case, *Peterson v. Borst*, should be treated separately. Before the Indiana Supreme Court was invited to the wrestling match, the United States District Court for the Southern District of Indiana had been asked on many occasions to consider redistricting challenges as waves of such cases splashed around the country following the U.S. Supreme Court's decisions in this area. In two instances, *Davis v. Bandemer*, most notably, Indiana politics provided the Court's water.

Bandemer v. Davis is perhaps the most famous redistricting case in Indiana history.[31] *Bandemer* dealt with a Democratic challenge to Indiana's 1981 reapportionment of senate and house districts.[32] A three-judge panel, consisting of District Judges James E. Noland and Gene E. Brooks from the Southern District and Senior Circuit Judge Wilbur F. Pell, heard the case.[33] In a split decision, the two district judges found that political gerrymandering claims were justiciable under the Fourteenth Amendment's Equal Protection Clause and that such claims were proved by intentional discrimination and the lack of proportional representation for an identifiable political group.[34] Judge Pell was more cautious, leaving aside the justiciability question and finding that additional evidence, such as resort to examining partisan baseline races should be required to prove such a claim.[35] The U.S. Supreme Court agreed with Judges Noland and Brooks on the justiciability issue, but found more evidence of vote dilution.[36] The Court's decision in *Davis v. Bandemer* is oft cited and the subject of considerable scholarly comment.[37]

Although perhaps the most known, *Davis v. Bandemer* is not the only Indiana redistricting case to have reached the U.S. Supreme Court. In *Chavis v. Whitcomb*, another three-judge panel, consisting of Southern District Judges Noland and William E. Steckler and Circuit Judge Otto Kerner, Jr., presided over a race-based equal protection claim involving the Indiana General Assembly.[38]

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31. 603 F. Supp. 1479 (S.D. Ind. 1984), *rev'd*, Davis v. Bandemer, 478 U.S. 109 (1986).

32. *Id.* at 1483.

33. *Id.* at 1481.

34. *Id.* at 1489-96.

35. *Id.* at 1500-04 (Pell, J., concurring).

36. 478 U.S. at 113.

37. *See, e.g.*, Fuentes-Rohwer, *supra* note 29; Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002); Michelle H. Browdy, Note, *Computer Models and Post-*Bandemer *Redistricting*, 99 YALE L.J. 1379 (1990).

38. 305 F. Supp. 1364, 1366 (S.D. Ind. 1969). The *Chavis v. Whitcomb* court was operating with the background of yet another three-judge court in the Southern District having held a 1965 Indiana reapportionment unconstitutional. *See* Stout v. Bottorff, 249 F. Supp. 488 (S.D. Ind. 1965) (per curiam) (Circuit Judge Roger J. Kiley, and Chief District Judges William E. Steckler and Robert A. Grant) (upholding house and senate reapportionment plans).

In *Chavis*, several plaintiffs with distinct legal theories argued that Indiana's Senate and House multi-member district that elected eight state senators and fifteen representatives in Marion County violated the Equal Protection Clause.[39] The Marion County plaintiffs alleged that the multi-member district diluted voting strength for black and poor residents. Specifically, the plaintiffs argued that if Marion County were divided into single-member districts, voters would be able to elect several candidates of choice in the geographic area in which a critical mass of black and poor voters lived; however, as it stood, the Marion County plaintiffs argued, they had greatly diminished political power.[40] A black Lake County, Indiana voter, who resided in a multi-member district with fewer representatives but a black population similar to Marion County's, alleged his vote was diluted in relation to black voters in Marion County, because the Marion County voters had opportunities to elect more representatives.[41]

After trial, the three-judge court essentially accepted the Marion County vote dilution argument, rejected the Lake County vote dilution argument (for lack of actual as opposed to theoretical vote dilution), and ordered that Marion County be subdivided into single-member districts.[42] In fashioning a remedy, the court, on its own motion, found the whole State of Indiana to be unconstitutionally apportioned due to population inequalities among districts and ordered uniform single-member redistricting state-wide.[43]

The Supreme Court reversed the three-judge panel's principal legal conclusions, holding that there was insufficient reason to believe the plaintiffs lacked effective representational choice and that a uniform districting scheme was not constitutionally required.[44] The Court left in place the three-judge court's decision to require a new state-wide reapportionment based on the evidence of significant population deviation.[45] In the midst of the Supreme Court's consideration of the case, Indiana passed a new reapportionment scheme that provided for single-member districts state-wide, including in Marion County.[46]

Many cases have presented issues involving the city-county council districts in Marion County, Indiana. In *Baird v. City of Indianapolis*, District Judge Sarah Evans Barker was confronted with redistricting and voting rights litigation

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39. 305 F. Supp. at 1367-69; Whitcomb v. Chavis, 403 U.S. 124, 127-31 (1971).

40. *Chavis*, 305 F. Supp. at 1367-68.

41. *Id.* at 1368.

42. *Id.* at 1399-1400.

43. *Id.* at 1387-88, 1391-92.

44. *Whitcomb*, 403 U.S. at 159-63.

45. *Id.* at 161-62.

46. *Id.* at 140; *see also* Chavis v. Whitcomb, 57 F.R.D. 32 (S.D. Ind. 1972) (three-judge court) (declining to extend jurisdiction to 1971 redistricting plan). In 1982, the Indiana Supreme Court decided a less sweeping case involving state statutes providing for multi-member county commission and county council districts and setting differential processes for redistricting counties. *See also* State Election Bd. v. Bartolomei, 434 N.E.2d 74 (Ind. 1982) (holding that statutes were not unconstitutional local or special laws).

involving the council that spanned about six years, between 1987-1993.[47] When the plaintiffs alleged that the number of single-member majority-minority districts was insufficient to be proportional, the court got the parties to enter a consent decree that permitted the council to draw a new map.[48] Judge Barker stated in a later decision that it had been her hope that the parties would draw a new map that would add majority African-American districts and that the new map, having done so, was entitled to deference.[49] The plaintiffs also challenged the existence of the four at-large council seats, which they argued, as multi-member districts in a majority white County, failed to permit African-Americans to elect a candidate of choice.[50] Judge Barker's rejection of the plaintiffs' theory and decision to include the at-large seats in an overall county-wide consideration of proportional minority representation was affirmed by the Seventh Circuit.[51]

In 1993, as Judge Barker was disposing of the fee petition in *Baird*,[52] District Judge John D. Tinder was deciding the case of *Vigo County Republican Central Committee v. Vigo County Commissioners*.[53] The plaintiffs in this case brought a malapportionment challenge to the four single-member county council districts in Vigo county. The total population deviation between the most and least populous districts was 37%.[54] The filing of the lawsuit prompted the county commissioners to adopt a new redistricting plan that reduced that total deviation to 8.41%.[55] Even though this was a fairly straightforward case that Judge Tinder readily acknowledged required judicial intervention, the introduction to his written decision on the merits is noteworthy for its conspicuous reflection on the principles of federalism and separation of powers that counsel for care in judicial involvement in reapportionment cases.[56] Ultimately, the judge rejected several

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47. *See* Baird v. Consol. Indianapolis, No. IP87-111C1, 1991 WL 557613 (S.D. Ind., April 25, 1991) (denying preliminary injunction); 1991 WL 423980 (S.D. Ind., Oct. 23, 1991) (granting summary judgment), *aff'd*, 976 F.2d 357 (7th Cir. 1992); 830 F. Supp. 1183 (S.D. Ind. 1993) (awarding attorneys fees to plaintiffs).

48. *Baird*, 1991 WL 557613, at *11.

49. *Id.*

50. *Baird*, 1991 WL 423980, at *1.

51. *Id.* at *5, *aff'd*, 976 F.2d 357 (7th Cir. 1992).

52. 830 F. Supp. 1183 (S.D. Ind. 1993).

53. 834 F. Supp. 1080 (S.D. Ind. 1993).

54. *Id.* at 1083.

55. *Id.*

56. *Id.* at 1082.

> The United States Constitution and various laws of the State of Indiana seek to insure that each person's vote has equal weight. Unfortunately, this noble and democratic concept is often strained in practice. This case illustrates how the reality of political pragmatism, if unchecked, can endanger this fundamental concept of equality. This court treads carefully into this arena, given the principles of federalism and the separation of powers on which our republican form of government is founded. Nonetheless, this court must adjudicate the case and controversy before it. If this court failed to act, some of the voters of Vigo County, Indiana would be in danger of losing

attempts by the defendants to winnow down the population deviation in favor of the plaintiffs' plan that permitted a deviation of less than one-half of one percent.[57]

A few years earlier, District Judge Larry J. McKinney was faced with perhaps a more challenging set of facts in *Dickinson v. Indiana State Election Board*.[58] In *Dickinson*, several voters and candidates for Indiana House of Representatives seats brought a Voting Rights Act challenge regarding two multi-member districts in Indianapolis.[59] The claim was that African-American voting strength was diluted by packing African-Americans into one district south of 38th Street in Indianapolis, and excluding them from another district north of 38th Street.[60] Judge McKinney faced several issues that seem even more problematic than the substantive law in redistricting cases, including timing and adequacy of remedy. Of special concern was that the Indiana General Assembly seemed the only party to effect a change in districts if a voting rights act violation were found, but the legislature was not a party in the case.[61] Thus, the court dismissed the case under the doctrine of laches, because the case had been brought in 1990 to challenge a 1981 apportionment scheme.[62] In the end, the Court of Appeals for the Seventh Circuit reversed the district court in part, holding that the necessary parties to effect remedy could come in later if and when a voting rights act violation were found.[63] Most important to Indiana redistricting history, however, the court agreed with Judge McKinney that it was important to give the Indiana General Assembly the opportunity to finish its decennial reapportionment, which after all could obviate the problem if there were one.[64]

As in *Baird*, Judge Barker once again had the opportunity in *Sexson v. SerVaas* to consider legal claims surrounding the 1991 redistricting of the Indianapolis-Marion County City-County Council.[65] In *Sexson*, the defendant city councilors and the mayor removed to federal court a lawsuit based on the state redistricting statute, arguing that any refusal to comply with state law in creating seven majority-minority districts was based on the requirements of

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the equality of voting promised to them by law.

Id.

57. *Id.* at 1088.

58. 740 F. Supp. 1376 (S.D. Ind. 1990).

59. *Id.* at 1378.

60. *Id.* at 1379.

61. In finding that the Indiana Election Board had no redistricting powers that were helpful in this regard, Judge McKinney relied in part on the 1962 case of *State ex rel. Welsh v. Marion Superior Court Room No. 5*, 185 N.E.2d 18 (Ind. 1962) (recognizing the Board's lack of redistricting power when one of the Board's members was future Southern District Judge James E. Noland). *See Dickinson*, 740 F. Supp. at 1380.

62. *Id.* at 1386-91.

63. Dickinson v. Ind. State Election Bd., 933 F.2d 497, 503 (7th Cir. 1991).

64. *Id.*

65. 844 F. Supp. 471 (S.D. Ind. 1994).

federal law, or more specifically, on the Voting Rights Act.[66] The *Sexson* court found that the defendants had abandoned their affirmative defense based on the Voting Rights Act, and that the case should thus be remanded to state court to decide the original state claim.[67] The defendants worked tirelessly to keep the case in federal court by filing post-trial motions with Judge Barker and ultimately taking an appeal to the Seventh Circuit.[68] Frequently mentioning that the role of the federal court was to avoid judicial intervention in purely state-law questions, Judge Barker was affirmed by the Seventh Circuit and once again remanded the case to state court.[69]

The most recent reapportionment case, decided by District Judge David F. Hamilton in the Southern District, is *Williams v. Jeffersonville City Council*,[70] which presented a classic malapportionment claim: five Jeffersonville City Council districts contained a total population deviation judicially described to be a "whopping 69.9 percent."[71] The council had considered four redistricting plans but none had achieved majority support for passage. The question for Judge Hamilton, as presented in part by the parties, was whether to adopt one of the proposed plans or to devise his own.[72] The case presented several issues common to local government redistricting cases: competing plans with differential population deviations; challenges to compactness and contiguity, such as observance of precinct boundaries; and, of course, the pressure to maintain racial composition in districts against assertions of retrogression.[73] In the end, the court chose the proposed plan with the lowest population deviation which was at 3.4%.[74] Judge Hamilton retained jurisdiction to assist candidates and local election officials in dealing with filing deadlines, which is a critical practicality in redistricting cases decided shortly before elections.[75]

III. *PETERSON V. BORST*

The first part of this article was a summary explanation of the general rules in redistricting: how our redistricting jurisprudence came to be. The second part was a catalogue of how Indiana state and federal jurists have coped with, and in some instances blazed a trail toward, the U.S. Supreme Court's redistricting decisions. The third and final part speaks to the practical reality of a redistricting case in the Twenty-first Century's politically polarized climate. It is a story that at least hints at the bawdy nature of a redistricting fight and the stress it can place

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66. *Id.* at 472.
67. *Id.* at 475.
68. *Id.* (denying motion to reconsider in most relevant part).
69. *Id.* at 477, *aff'd*, 33 F.3d 799 (7th Cir. 1994).
70. No. 4:03-CV-002-DFH, 2003 WL 1562565 (S.D. Ind., Feb. 19, 2003).
71. *Id.* at *5.
72. *Id.* at *8.
73. *Id.* at *8-9.
74. *Id.* at *9.
75. *Id.* at *10.

on the judiciary.

A. The Tale[76]

Municipal political boundaries in Indiana are obliged to be redistricted after the census every ten years, following reapportionment for congressional, state senate, and state representative seats.[77] Although this is true state-wide, for purposes of this discussion, the focus is on Marion County, which presently contains Indiana's only consolidated city.[78] Under the UniGov statute,[79] there are twenty-five single-member council districts in the county.[80] Those districts were to have been redrawn by local government by the end of 2002 for the 2003 primary and general elections.[81] The process only started before conflict arose.

The City-County Council in Marion County was in 2002 divided by the closest of margins—fifteen Republicans and fourteen Democrats—and, in controversial matters, that division was usually the split of the vote.[82] The mayor, a Democrat, has the right to veto most enactments of the council, including redistricting ordinances.[83] Thus, Marion County has had a truly divided government.

In the spring of 2002, each political caucus of the council began to develop its proposed redistricting maps. Experts and lawyers were hired, decisional processes were set, and public hearings were held. However, despite the procedural formalities, there was little doubt of the outcome: (1) the Republicans would generate a map that helped Republicans, the Democrats would generate a map that would help Democrats; (2) in October of 2003, the Republicans would pass their map in the council by a party-line vote of 15-14; and (3) the mayor would veto it. And, true to form, that is exactly what happened.

The next historical account was also predicted far in advance. Under the

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76. Telling the tale requires two caveats. First, the author served as lead counsel for Mayor Peterson in the discussed litigation. Although the experience provides the author with an ability to give a first-hand account of the background, proceedings, and certain strategy elements, the reader should also be aware that those perspectives come from one of the advocates in the case. Second, to the extent statements in this part constitute opinion or commentary, they are those of the author solely.

77. IND. CODE § 36-4-6-3 (1993).

78. IND. CODE § 36-4-1-1 (2004) (first class city has 600,000 or more residents); IND. CODE § 36-3-1-4 (1980) (when city reaches first class city classification, it becomes a consolidated city). The new requirement became law on March 17, 2004. 2004 Ind. Acts 64.

79. IND. CODE § 36-3-1-1 (1980).

80. *Id.* § 36-3-4-3(a).

81. *Id.*

82. In addition to the twenty-five single-member council districts, there are four at-large representatives elected on a county-wide basis. IND. CODE § 36-3-4-3(c) (1988). These are the seats that were at issue in *Baird v. Consolidated Indianapolis*, No. IP87-111C1, 1991 WL 423980 (S.D. Ind., Oct. 23, 1991), *aff'd* 976 F.2d 357 (7th Cir. 1992).

83. IND. CODE § 36-3-4-14 (1980).

UniGov law, if Marion County fails to complete its council redistricting on or before November 8, 2002, the entire matter was required to be thrown into the Marion Superior Court sitting *en banc*.[84] Under that court's enabling statute, thirty-two superior court judges would hear the case together.[85] The political-party split among those judges was, and continues to be, seventeen Republicans and fifteen Democrats. It was believed by many that a majority Republican court would be sympathetic to a Republican-initiated map-drawing process in litigation. Interestingly, approximately one year earlier, the major political parties in Marion County were so jealous about the political make-up of the Marion Superior Court, that there was much gnashing of teeth when the Democratic Party sued the Marion County Election Board in early 2002 to reconfigure voting machines for the fall 2002 election to permit judges to be part of straight-ticket voting. The political rumor mill held that the Republicans feared that the Democrats might just get enough votes with the changed machine configuration to cause a 16-16 tie in the Marion Superior Court, which would lead to uncertain judicial review over the upcoming redistricting fight. As it happens, the Democrats won the party-lever lawsuit, but lost the judicial election, and the party split on the court remained 17-15 in favor of Republicans.[86]

And what of those predictions about how things would occur in the superior court? They turned out to be accurate with the exception of one important deviation. The court did not draw its own map, as the statute plainly contemplates it may do,[87] but rather the court adopted wholesale the exact map that the Republicans had developed and passed 15-14 in the council. This was the same map the mayor had vetoed, and that was a dead letter, at least legally speaking, before the first petition was filed with the superior court to redistrict

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84. IND. CODE § 36-3-4-3(d) (1988).

85. *Id.* § 33-5.1-2-1.

86. The "judges party-lever" lawsuit was the second in a string of four proceedings that framed the 2003 municipal elections in Marion County. *See* Vic Ryckaert, *Judicial Race Could Hinge on Rule Change*, INDIANAPOLIS STAR, Nov. 3, 2002, at V16. The first was the Republicans' successful effort to stalemate the mayor's precinct redistricting plan, which would have reduced by about one-third the number of precincts in Marion County. Although both major political parties generally agree that the 917 precincts in Marion County are far too many to be administratively convenient, the Republicans were reportedly concerned that the precinct combinations would make their ideal council redistricting map more difficult to draw, because council district boundaries usually must respect existing precinct lines. *See* IND. CODE § 36-3-4-3(a)(3) (1980). The Indiana Election Commission vote on the mayor's reprecincting plan was 2-2—cast along party lines—and thus lacked the required third vote for approval. *See* John Strauss, *Council Exploring New Boundaries*, INDIANAPOLIS STAR, Feb. 8, 2002, at A2. The council redistricting fight, culminating in the Indiana Supreme Court's decision in *Peterson v. Borst*, was the third proceeding. And a Democratic Party-initiated lawsuit over the Republican-approved form of the municipal ballot served as the capstone dispute. *See* John Fritze, *Ballot Ruling May Delay Election; in a Victory for Democrats, Judge Orders a Redesign Before Nov. 4*, INDIANAPOLIS STAR, Oct. 9, 2003, at A1.

87. IND. CODE § 36-3-4-3(d) (1980) ("The court sitting en banc may appoint a master to assist in its determination and may draw proper district boundaries if necessary.").

the county. That one deviation, however, turns out to be a critical factor in this tale and in understanding the role of the Indiana judiciary in redistricting cases.

A whole discussion could be undertaken concerning the trial of the redistricting case itself. Arguing a case to thirty-two judges in the same chamber is not an everyday feat. Most of the judges met—fittingly, in the city-county council's legislative assembly room—in two *en banc* sessions: a first session to hear preliminary motions, and then a second session in which to hear the trial on the merits. The entire trial was judicially confined to a total of three hours for all parties.[88] For the purpose of the present discussion, the highlights from the pretrial and trial processes include the following:

(1) Before the trial, the attorney representing the council Democrats moved to recuse two Republican judges, one because he was the brother of one of the local election board member-defendants to the lawsuit, and the other because he was the brother of a Republican council member who was running for reelection.[89]

(2) Similarly, the lawyer representing the council Republicans moved to recuse one Democratic judge, because she was the wife of the county Democratic party chair.[90]

(3) In response to those recusal motions, the Republican election board member resigned from the board, eliminating the issue of his brother's putative conflict in the case. In addition, the Democratic judge recused herself. Finally, the Republican judge, who was the brother of the Republican council member, denied the recusal motion and, because he had become the Marion Superior Court's presiding judge during the pendency of the case, also became the presiding judge in the case.[91]

(4) After the trial, the lawyer for the council Republicans moved to recuse another Democratic judge, arguing that the judge had demonstrated bias in the questions he had asked during the *en banc* trial.[92]

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88. Peterson v. Borst, No. 49S02-0302-CV-71, Appellants' Appendix at 539-41.

89. *Id.* at 331-33.

90. *Id.* at 7, 16.

91. *Id.* at 10, 16, 516, 520.

92. *Id.* at 13, 358-66. Clearly, as seems to occur routinely in redistricting cases, the politically-charged atmosphere brought a number of allegations of conflict and requests for recusal. Later, the council Republicans would even move to recuse one of the members of the Indiana Supreme Court in the case, Justice Theodore Boehm. That motion came *after* the oral argument in the case, ostensibly not because of anything that happened during the argument, but because the lawyer for the Republicans alleged he only later learned that the justice was the mayor's unpaid appointee to a local cultural tourism commission. Justice Boehm did not recuse himself, in part citing Judge Sarah Evans Barker's decision in *Sexson v. SerVaas*, 830 F. Supp. 475, 478 (S.D. Ind. 1993), in which she had decided not to recuse under similar circumstances. *See* Peterson v. Borst, 784 N.E.2d 934, 937 (Ind. 2003) (Boehm, J.) (denying motion to recuse). *Cf.* Williams v. City of Jeffersonville, 2003 WL 1562565 (S.D. Ind., Feb. 19, 2003) (granting motion to realign city as party-plaintiff despite claim by defendant city council that attorney had conflict in representing city executive and city council).

(5) In the end, the court adopted the Republican map by a party line vote of 16-13, which corresponded to sixteen Republicans judges voting for the Republican plan, and thirteen Democratic judges voting against the Republican plan. Three judges did not participate for various reasons.[93]
(6) There were four dissenting opinions, all authored by Democrats. One dissenting opinion called the trial a "disorderly and bewildering spectacle" and a "procedural calamity," and called the adopted map a "political gerrymander."[94]
(7) One Republican judge even moved to strike one of the dissenting judges' opinions.

B. The Appeal

It is against the concededly convoluted background at the trial level that the Indiana Supreme Court accepted jurisdiction of the case, completely bypassing the court of appeals because of the civic importance of the case and the need for swift resolution.[95] A swift resolution was indeed realized. The span of time from the filing of the transfer petition to the court's decision in the case, including oral argument, was *five weeks*.

Although there were several issues briefed and argued to the court, including separation of powers[96] and due process claims,[97] the principal issue, and the one the court found dispositive, was that of the proper role of the superior court. As the Indiana Supreme Court framed the issue, the question was "whether the Superior Court violated its duty of neutrality by adopting a redistricting plan developed by one political party."[98]

The court recognized that it was embroiled in a spirited partisan redistricting dispute and that it was writing on a clean slate regarding the role of Indiana

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93. *Peterson*, Appellants' Appendix at 17-28, 29-72; *Peterson*, 786 N.E.2d at 671.

94. *Peterson*, Appellants' Appendix at 93-104 (Dreyer, J., dissenting), 73-87 (Hawkins, J., dissenting), 88-92 (Magnus-Stinson, J., dissenting), 105 (Stoner, J., joining dissenting opinions).

95. IND. CODE § 36-3-4-3(d) (1980) ("An appeal from the court's judgment must be taken within thirty (30) days, directly to the supreme court, in the same manner as appeals from other actions.").

96. The Council Republicans argued throughout the council consideration of the redistricting plans as well as during the *en banc* trial that the mayor lacked the power to veto the narrowly-passed ordinance containing the plan, despite the fact that prior councils had uniformly presented such ordinances to prior Republican mayors for signature or veto. In the supreme court, that argument was presented in terms of a required deference to the council-passed plan, without regard to the fact that it had been vetoed, and thus, not enacted.

97. This claim related to many aspects of the *en banc* proceeding, including that it was not clear that there was even a majority decision in the case. Less than a majority of the Marion Superior Court had signed the judgment (sixteen out of thirty-two court members), and the court had never established rules governing *en banc* proceedings.

98. Peterson v. Borst, 786 N.E.2d 668, 671 (Ind. 2003) (per curiam).

courts in such cases.[99] In defining the role of the judiciary in redistricting cases, the court (1) noted the judicial canons that required judicial impartiality,[100] (2) discussed the court's structural role as neutral arbiter of disputes between the political branches of government,[101] and (3) cited cases from other jurisdictions, including both state and federal, that had required judicial blindness to the political consequences of a redistricting plan.[102] The court drew support from a three-judge court decision in *Prosser v. Elections Board*.[103]

> A court called upon to draw a map on a clean slate should do so with both the appearance and fact of scrupulous neutrality. A number of courts, federal and state, have taken that view. "Judges should not select a plan that seeks partisan advantage—that seeks to change the ground rules so that one party can do better than it would do under a plan drawn up by persons having no political agenda—even if they would not be entitled to invalidate an enacted plan that did so."[104]

The court next focused its articulated role on the question of the trial court's wholesale adoption of an indisputably partisan plan. While the court held that not every partisan initiated plan must be rejected in a court-ordered redistricting case,[105] the plan the trial court had adopted represented one political party's idea of how district boundaries should be drawn and therefore could not conform with the principle of judicial independence.[106] Accordingly, the court unanimously reversed the trial court's split decision.[107]

The court then did something even more interesting. In fashioning a remedy, the court refused to remand the case to the trial court or to appoint a special master to draw a new map (the suggestion of the council Democrats). Rather,

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99. *Id.* at 671-72 (citing Colgrove v. Green, 328 U.S. 549 (1946)).

100. *Id.* at 672.

101. *Id.*

102. *Id.* at 673-75.

103. 793 F. Supp. 859 (W.D. Wis. 1992) (three-judge district court adopting its own redistricting plan that combined features of two best plans submitted).

104. *Peterson*, 786 N.E.2d at 673 (quoting *Prosser*, 793 F. Supp. at 867).

105. The court recognized that courts in redistricting cases have done both. *See id.* at 674-75. *Cf.* Beauprez v. Avalos, 42 P.3d 642, 647 (Colo. 2002) (adopting a plan proposed by plaintiffs representing the interests of a partisan after legislature and governor failed to agree on plan); Burling v. Chandler, 148 N.H. 143, 804 A.2d 471, 474, 483-84 (2002) (drawing its own redistricting plan because it lacked a principled way to choose among partisan-proposed plans).

106. *Peterson*, 786 N.E.2d at 673 ("We conclude . . . that the court's approval of the [Republican] Plan in the circumstances of this particular case unavoidably introduced the appearance if not the fact of political considerations into this judicial process and thus makes redrawing the boundaries necessary."); *id.* ("We conclude that the Superior Court's decision to adopt the [Republican] Plan, which was uniformly endorsed by members of one party and uniformly rejected by members of the other, does not conform to applicable principles of judicial independence and neutrality.").

107. *Id.* at 678.

because the primary election was drawing near, the court drew its own map and attached it to the opinion rather than remanding the case to the superior court.[108] Although the court did not specifically explain the technical process it went through to create the map, the court had earlier required the parties to submit electronic data to the court in the form of the software program used by both sides to draw their proposed maps.[109]

Compared to any map created by any party throughout the redistricting process, the court's map seemed the most geographically regular because the districts were very compact, implying the absence of gerrymandering. While the court left open the possibility that the executive and legislative branches of city-county government could produce their own compromise map quickly,[110] those branches did not.[111]

C. Significances

At least four significant lessons may be drawn from the Indiana Supreme Court's decision in *Peterson v. Borst*.

First, the case presented an issue quite different from most other judicial interventions discussed in this article. In *Peterson*, the court was reviewing the redistricting plan adopted by an inferior court, not for strict legality, but for compliance with principles of judicial independence. This is the first time the Indiana Supreme Court has defined the role of the judiciary when it has the map-drawing function in redistricting cases, and it stated clearly that Indiana courts must be and appear to be politically neutral and must be governed solely by the legal requirements for redistricting. The court's unanimous decision and *per curiam* opinion shines the light of judicial impartiality like a beacon, and it also prevented an increasingly cynical and potentially nihilistic sentiment to take hold of officials and voters alike in Marion County.[112]

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108. *Id.* at 676. The council Republicans argued the Indiana Supreme Court lacked the power to draw its own map. But the court, noting its unquestioned appellate jurisdiction in the case, determined that its rule-based remedial powers were broad enough to permit the action. *Id.*

109. *Id.* at 676-77.

110. *Id.* at 678.

111. Even then, the case was not exactly concluded. The council Republicans filed a motion for rehearing in the Indiana Supreme Court arguing that the court's decision violated the Voting Rights Act, and that the court's remedy violated due process. Although the court denied the rehearing petition, *see* Peterson v. Borst, 789 N.E.2d 460 (Ind. 2003) (per curiam), the clear implication drawn by the lawyers for the council Democrats and the mayor was that the rehearing petition—based solely on federal issues—was a precursor to the filing of a petition for *certioriari* in the U.S. Supreme Court or an attempted federal collateral attack on the Indiana court's judgment to be brought in the Southern District. In the end, neither of those federal remedies was sought.

112. *See* Editorial, *Not Too Late for Fair Council Districts*, INDIANAPOLIS STAR, Feb. 22, 2003, at A14 (opining that "party-line voting among judges doesn't exactly inspire public confidence in judicial impartiality" and that "[b]y calling a halt to gerrymandering in Marion County, the [Indiana Supreme] court has a chance to reduce the level of cynicism that increasingly

Second, reapportionment cases historically have pitted competing ideologies about the appropriateness and desirability of judicial intervention. *Peterson* dealt with partisanship rather than ideology. While the Indiana Supreme Court clearly found itself in a political thicket, the main pressure point was in a different place. The court was not asked to invalidate an enacted apportionment on political grounds, like in a *Davis v. Bandemer* political gerrymandering case (giving rise to the usual concerns about judicial deference to the political process); rather, the court was asked to judge the role of the trial court in exercising a political function.

Third, the court's willingness to address the case quickly was indispensable to achieving a result that could be administered without delaying the primary election. In the interests of the timing of the primary election, and utilizing technology available to the court, it took the unusual step of drawing its own council map according to the statutory criteria. As a practical matter, this may have been the unique case where it was administratively easier to have the appellate court fashion a remedy, since the trial court would have had to act again on remand through the full *en banc* panel.

Finally, although the court did not say so in its opinion, it seems clear that Marion County's system of electing judges in partisan elections is not conducive to creating an atmosphere of impartiality in deciding a redistricting case. That is not to say that any judge on either side of the aisle did anything improper nor did the Indiana Supreme Court imply that.[113] Nevertheless, the structure of superior court itself presents unavoidable pressures and appearances of partisan allegiance. Chief Justice Randall Shepard signaled this point, albeit with a sense of humor, during the oral argument in *Peterson v. Borst*. When informed that there was no recorded reason for why one of the thirty-two superior court judges had not participated or voted in the trial, the Chief Justice quipped: "He can explain that at the next [party] slating convention."[114] Also during the oral argument, Justice Boehm picked up that theme by noting that the superior court was partisan by structure, that each judge owed his or her seat to the party apparatus, that each judge would likely have to recuse himself or herself but for the statutory obligation to sit in the case, and that it was "remarkable that [the division of the judges in deciding the case] turned out to be exactly along the lines of the parties that elected" them.[115]

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threatens the political process.").

113. *Peterson*, 786 N.E.2d at 673 ("We do not in any way intend to imply that the Superior Court or any of its judges acted with any improper motive or intentionally disregarded their duties of impartiality and independence. We do not question the earnest good faith of the judges in attempting to discharge their judicial obligations.").

114. *Indiana Judicial System, 2003 Oral Arguments Online*, *at* http://www.in.gov/judiciary/webcast/archive/oao2003.html (last visited Apr. 10, 2004).

115. *Id.*

CONCLUSION

Neither the intensity nor the frequency of the partisan and ideological disputes of redistricting cases is likely to wane. The frequency of judicial involvement in redistricting cases and similarly politically-charged cases, both big and small, from *Bush v. Gore* to the Marion County municipal election cases, is likely to increase. Those who have opined that judicial intervention in redistricting mires courts in politics seem to be right, which seems especially true in the partisan cases, as opposed to traditional malapportionment and Voting Rights Act cases. However, when a court seems above the fray in one of these cases, it solves a seemingly insoluble morass created by the "political branches" of government and increases the esteem of the court in deciding a matter so controversial yet so central to our republican form of government—at least until the time for the next reapportionment.

INDIANAPOLIS JUDGES AND LAWYERS DRAMATIZE *EX PARTE MILLIGAN*, A HISTORICAL TRIAL OF CONTEMPORARY SIGNIFICANCE

JUSTICE FRANK SULLIVAN, JR.*

The two central Indiana American Inns of Court[1] joined forces this past fall in a dramatic portrayal of the saga of the famous 1866 United States Supreme Court decision, *Ex parte Milligan*.[2] Three judges and eleven Indianapolis lawyers from the Indianapolis American Inn of Court and the Sagamore American Inn of Court were cast in a production that was presented on October 18, 2003, as part of the Centennial Celebration of the United States Courthouse in Indianapolis. This short essay introduces the script of the production.

The play illustrates the story of a civilian in Indiana whose conviction for treason and death sentence imposed by a military tribunal was held by the Supreme Court to be unconstitutional because military tribunals could not try civilians. The case has received renewed attention in legal circles with the possible increased use of military tribunals since 9-11.[3]

I. THE 1866 *MILLIGAN* DECISION

Before the United States Supreme Court in *Ex parte Milligan* was the question of whether Southern sympathizers in Indiana could be tried before military tribunals (rather than civilian courts) on charges of conspiracy against the United States. In holding the trials unconstitutional, Justice David Davis famously wrote for the Court's majority:

> The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; as has been happily proved by the result of the great effort to throw off its just

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* Justice, Indiana Supreme Court. A.B., 1972, Dartmouth College; J.D., 1982, Indiana University School of Law—Bloomington; LL.M., 2001, University of Virginia School of Law.

1. American Inns of Court are local organizations consisting of judges, lawyers, law professors, and law students that regularly hold programs and discussions on matters of legal ethics, skills, and professionalism. American Inns of Court were inspired by the traditional English model of legal apprenticeship and modified it to fit the particular needs of the American legal system. There are approximately 340 Inns in the United States with more than 20,000 members.

2. 71 U.S. (4 Wall.) 2 (1866).

3. John Strauss, *Lawyers' Play Is a History Lesson Touching on Today's Events*, INDIANAPOLIS STAR, Oct. 17, 2003, at B1.

authority.[4]

In holding Southern sympathizers entitled to Constitutional protections, the Court's decision is even more notable for its author. Appointed to the Court by President Lincoln, Justice Davis was one of the founders of the Republican Party and Lincoln's floor manager at the 1860 Republican nominating convention.

Milligan is also a fascinating piece of Indiana history. Here is a very brief sketch of the litigation.

The story of Copperhead strength in Indiana during the Civil War is well known, especially the stalemate between Republican Governor Oliver P. Morton, elected in 1860, and the Democratic legislature elected in 1862. During the early 1860's, a number of Indiana citizens including Lambdin P. Milligan are alleged to have conspired to undermine the Union war effort in several ways. Among the allegations are conspiracies to establish a second confederacy of "Northwest States" in alliance with the South; free Southern prisoners of war; and even assassinate Morton.

Milligan and others were charged with treason and tried before a military tribunal beginning in October, 1864, in what history calls the "Indianapolis Treason Trials." Milligan and the others were convicted and sentenced to death in January, 1865. By now the war had turned in the North's favor and Milligan's lawyer, Joseph McDonald, secured an audience with President Lincoln and, he thought, a commutation of the death sentences. But before the paperwork was finalized, Lincoln was assassinated and President Johnson refused to commute the sentences. On the eve of the executions, however, Johnson reversed course, first postponing and then commuting the death sentences to life imprisonment at hard labor.

Meanwhile, Milligan and the others had filed a petition for habeas corpus in the Federal District Court in Indianapolis, contending that no sentence could properly be imposed on them by a military court because they were civilians and Indiana was not a theater of war. The case was heard by a two-judge panel consisting of Judge David McDonald, the federal district judge for Indiana, and Justice Davis, the Supreme Court justice assigned to the federal circuit that included Indiana. These two jurists disagreed as to the outcome. Under the jurisdictional rules in place at the time, this split created a case to be resolved by the Supreme Court.

As noted above, the Supreme Court in 1866 held that the military tribunal did not have jurisdiction to try Milligan. Justice Davis spoke for a majority of five justices in holding that the trials were unconstitutional. A minority of four led by Chief Justice Salmon P. Chase concurred that the military tribunal did not have jurisdiction to try Milligan. But these justices were of the view that when the nation is at war, it would not violate the Constitution for Congress to provide for trials by military tribunals of persons accused of conspiracy like Milligan. The reason, they said, that Milligan's trial was improper was not because it was

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4. *Milligan*, 71 U.S. at 120-21.

unconstitutional but because such trials were not authorized by Congress.[5]

This aspect of *Milligan*—its holding that it was beyond the power of Congress to authorize the use of military tribunals in times of rebellion where, for example, the civilian courts might be allied with the rebels—sparked sharp criticism of the *Milligan* holding by many who believed that military courts were essential to protect former slaves from violence in the South. Indeed, President Andrew Johnson used *Milligan* as justification for reducing military authority in the occupied states of the former Confederacy.[6]

II. *MILLIGAN*'S CONTEMPORARY SIGNIFICANCE

The *Milligan* decision figured prominently in a World War II case, *Ex parte Quirin*.[7] During the war, eight men in German military uniforms, carrying explosives and other supplies, landed from German submarines at night on the East Coast. They buried the uniforms and supplies, and proceeded, in civilian dress, to various places in the United States under instructions from the German High Command to destroy war industries and war facilities in the United States. They appealed their convictions by a military tribunal, invoking *Milligan*'s pronouncement that the law of war "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."[8] The Supreme Court rejected this contention, concluding that *Milligan* was limited to its facts: "Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as—in circumstances found not there to be present, and not involved here—martial law might be constitutionally established."[9] Because the appellants in *Quirin* were belligerents, they were subject to the authority of military tribunals.

Milligan (and the gloss placed upon it by *Quirin*) resonates—perhaps reverberates is a better verb—today with military tribunals being considered for use in the fight against terrorism. Two such cases, both of which invoke *Milligan*, have just reached the Supreme Court.[10]

Hamdi v. Rumsfeld[11] is the case of Yaser Esam Hamdi, a man apparently born in Louisiana but who left for Saudi Arabia when he was a small child. During United States military operations in Afghanistan, thousands of alleged enemy combatants were captured, including Hamdi. Although initially detained in Afghanistan and then Guantanamo Bay, Hamdi was transferred to the Norfolk

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5. *Id.* at 140-41.

6. Donald G. Nieman, *Ex parte Milligan*, *in* THE OXFORD COMPANION TO THE SUPREME COURT 548 (Kermit L. Hall ed., 1992).

7. 317 U.S. 1 (1942).

8. *Id.* at 45 (quoting *Milligan*, 71 U.S. at 121).

9. *Id.*

10. Hamdi v. Rumsfeld, 124 S. Ct. 981 (2004) (granting cert.); Rumsfeld v. Padilla, No. 03-1027, 2004 U.S. LEXIS 1011 (Feb. 20, 2004) (granting cert.).

11. Hamdi v. Rumsfeld, 316 F.3d 450 (4th Cir. 2003), *cert. granted*, 124 S. Ct. 981 (2004).

Naval Station Brig after it was discovered that he may not have renounced his American citizenship.

Hamdi petitioned for a writ of habeas corpus, seeking release. His case has raised a number of issues. The one that has reached the Supreme Court arises from the federal district court's order requiring the government to justify his detention. The district court held a Defense Department official's declaration insufficient but the federal court of appeals reversed. It held that

> [b]ecause it [was] undisputed that Hamdi was captured in a zone of active combat in a foreign theater of conflict, . . . the submitted declaration is a sufficient basis upon which to conclude that the Commander in Chief has constitutionally detained Hamdi pursuant to the war powers entrusted to him by the United States Constitution. No further factual inquiry [was] necessary or proper.[12]

The Supreme Court granted certiorari on January 9, 2004.

Padilla v. Rumsfeld[13] is the case of Jose Padilla, an American citizen. On May 8, 2002, Padilla flew on his American passport from Pakistan, via Switzerland, to Chicago's O'Hare International Airport. There he was arrested by FBI agents pursuant to a material witness warrant in connection with the terrorist attacks of September 11. On June 8, the President issued an order designating Padilla as an enemy combatant. Padilla was taken into custody by the Defense Department and transported to the high-security Consolidated Naval Brig in Charleston, South Carolina, where he was held for ongoing questioning regarding the al Qaeda network and its terrorist activities in an effort to obtain intelligence.

After analysis of the applicability of *Milligan* (and *Quirin*), the federal court of appeals concluded that Padilla's detention was not authorized by Congress, and absent such authorization, the President did not have the power under the Constitution to detain as an enemy combatant an American citizen seized on American soil outside a zone of combat.[14] In reaching this conclusion, the court expressly distinguished the *Hamdi* case as involving the detention of an American citizen seized within a zone of combat in Afghanistan.[15] The Supreme Court granted certiorari on February 20, 2004.

III. THE 2003 *MILLIGAN* PRODUCTION

The United States Courthouse in Indianapolis celebrated its centennial in 2003 with a flourish.[16] The United States District Court for the Southern District

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12. *Id.* at 459.

13. 352 F.3d 695 (2d Cir. 2003), *cert. granted*, No. 03-1027, 2004 U.S. LEXIS 1011 (Feb. 20, 2004).

14. *Id.* at 698.

15. *Id.* at 699.

16. By Act of Congress signed into law by President George W. Bush on June 23, 2003, the Courthouse was renamed the Birch Bayh Federal Building and United States Courthouse. Birch

of Indiana, the Court's Historical Society, and the General Services Administration (the building manager) collaborated on a series of ceremonies, programs, and social events to commemorate the beautiful building's century of service to city, state, and country. Among the activities was an open house to which the entire community was invited to visit the magnificent beaux-arts structure.

The two American Inns of Court in Indianapolis were invited to be a part of the open house and quickly landed on the idea of making a presentation relating to the *Milligan* case. Though decided well before construction of the Courthouse, the case remains the most significant ever decided by the court now headquartered there.

A joint planning committee was established and its members soon concluded that some type of theatrical presentation would likely be of much greater interest than a series of lectures and papers. A sub-committee, headed by Elizabeth G. Russell and including Suzanne M. Buchko, James A. Geiger, Debra McVicker Lynch, Marsh C. Massey, and Karen Butler Reisinger, set to the task of capturing a proceeding that spanned two years and three forums in a script for a forty-five-minute production. They did so extremely well.

A virtually complete transcript of the trial before the military tribunal exists and the record is also extensive of the proceedings before the Supreme Court. On the other hand, there is little record of the habeas proceeding itself. The script committee relied on the record but also used creative license when it found it to be necessary: the production is a dramatization, not a re-enactment. For example, the script presents Major General Alvin P. Hovey, the military commander of Indiana, as the presiding member of the tribunal's jury. This is not historically accurate—Hovey was not a member of the jury—but it served to illustrate Hovey's central role in the brief time available. Hovey had ordered Milligan arrested, had convened the tribunal, and was responsible for carrying out the sentence.

The production took place in the high-ceilinged, marble William E. Steckler Ceremonial Courtroom,[17] with its mosaics, beautiful painted friezes, and massive stained glass windows providing a most impressive setting.

United States District Judge Sarah Evans Barker played Indianapolis federal Judge David McDonald and U.S. District Judge David F. Hamilton played United States Supreme Court Justice David Davis who wrote the Supreme Court's opinion in *Milligan*. This author played General Hovey.

Lawyers in leading parts included Russell, the narrator; Hugh E. Reynolds,

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Bayh represented Indiana in the United States Senate from 1959-1981, during which time he was a member of its Judiciary Committee and, as chairman of the Constitutional Amendments Subcommittee, authored two amendments to the United States Constitution: the Twenty-fifth Amendment which specifies procedures for presidential disability and vice presidential succession; and the Twenty-sixth Amendment which lowered the voting age to 18.

17. William E. Steckler served as a member of the U.S. District Court, Southern District of Indiana, from April 7, 1950 until his death on March 8, 1995. He served as chief judge from 1954 until 1982 and assumed senior status on December 31, 1986.

Jr., as Milligan's lawyer, Joseph E. McDonald; Massey, as the prosecutor before the military tribunal; and Thomas A. John, as Milligan.

Other Indianapolis lawyers in the cast included Geiger, Lynch, Reisinger, Ricardo A. Rivera, Michael Rosiello, and Kevin S. Smith. Buchko most ably directed the production.

CONCLUSION

The script that follows represents the efforts of 21st century Hoosier judges and lawyers to dramatize what is at once a major event in Indiana history, an important case in American Constitutional history, and a legal precedent of great contemporary significance. Those involved in its preparation and production believe *Ex parte Milligan*'s remarkable story, nearly seven score years after its writing, warrants the sober reflection of all citizens and hope that this presentation makes a contribution to that end.

EX PARTE MILLIGAN

A joint project of the Indianapolis and Sagamore Inns of Court
Indianapolis, Indiana

Milligan Project Committee Chair—Indiana Supreme Court Justice
Frank Sullivan Jr.
Script Committee—Suzanne Buchko, Jamie Gieger, Debra Lynch,
Marsha Massey, Karen Reisinger, Elizabeth G. Russell

adapted from the transcripts of the military trial of Lambdin Milligan,
the proceedings on the writ of habeas corpus before the Circuit Court
of the United States for the District of Indiana, the personal journals
of Judge David McDonald, and the opinions of the Circuit Court
and the Supreme Court of the United States

Citation to the relevant case:
Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866)

for additional information, contact:
Suzanne Buchko, pro se law clerk
United States District Court
Southern District of Indiana
46 East Ohio Street
Indianapolis, Indiana 46204

Cast of Characters

Newsboy—*young man dressed in knickers, sweater and cap.*

Narrator—*woman dressed in an 1860s traveling outfit complete with bonnet and fan.*

Bailiff—*middle-aged man dressed in broadcloth frock coat.*

Prosecutor—*government attorney, Union officer.*

General Alvin Peterson Hovey—*40-year-old General of the Union Army.*

Five Member Military Tribunal—*Union officers.*

Lambdin Milligan—*middle-aged man, attorney and political activist, dressed in well-cut and tailored frock coat.*

Defense Counsel—*attorney representing Milligan in the trial court, dressed in well-cut and tailored frock coat.*

Joseph Ewing McDonald—*Milligan's attorney who filed the petition for a writ of habeas corpus and who represented Milligan before the United States Supreme Court dressed in well-cut and tailored frock coat.*

Judge David McDonald—*60-year-old Judge of the United States District Court of the District of Indiana.*

Justice David Davis—*50-year-old Justice of the United States Supreme Court.*

[Note: This presentation was first performed in the fully restored 1905 ceremonial Steckler Courtroom of the United Stated District Court for the Southern District of Indiana on October 18, 2003, as part of the Centennial Celebration for the Birch Bayh United States District Courthouse. For a smaller production, the Military Tribunal could be eliminated or reduced to three members. Also, although the judges in our production wore judicial robes, during the 1860's, federal judges did not wear robes on the bench.]

Setting

Using a large courtroom, three "bench" areas are set up: one upstage and center for the U.S. Supreme Court, a second stage left for the military tribunal, and a third stage right for the circuit court. A single counsel table is set in the middle of the well with a movable podium in one corner. Three chairs are set upstage behind the counsel table. A standing desk is set downstage right and a small table with two chairs is set down stage left.

Time

The action takes place between December, 1864 and April, 1866, in Indianapolis, Indiana, and Washington, D.C.

EX PARTE MILLIGAN

SCENE ONE

JOSEPH EWING MCDONALD is seated in the front row of the gallery. NEWSBOY enters and makes his pitch to the audience.

NEWSBOY

Extra! Extra! Read all about it! Milligan treason trial scheduled to conclude today! Former famed attorney, Lambdin Milligan claims that he was unaware of any nefarious intent of the Sons of Liberty. The prosecution's final rebuttal argument is set to begin any moment!

NARRATOR enters, buys a paper from the NEWSBOY, and considers the front page.

NEWSBOY
(as he exits)

Extra! Extra! Read all about it!

NARRATOR—steps forward. Her tone is that of a chatty neighbor who is well informed about goings on in Indianapolis of the 1860's. She remains on stage for the entire presentation moving off to the side during scenes but keenly interested in what is going on at all times.

NARRATOR

Why is the case, *Ex Parte Milligan*, so important? Well, to understand its importance, and the reasons for its existence at all, we must understand the events that surround it. You see, at the time the case began, the North had not been faring very well in the great conflict with the South. In states that were then-known as the Northwest, that is: Ohio, Indiana, and Illinois, there was strong resentment and opposition to the war. Many of the folks in the Northwest had southern roots since the settlers of those states came from Kentucky, Maryland, Virginia, and North Carolina. In fact, a lot of the most prominent men in the Northwest states were actually Southerners by birth or marriage.

There were also strong economic and agricultural bonds between Indiana, Ohio Illinois, and the Southern states. Throughout the war, a thriving (and somewhat clandestine) trade took place between the Northwest and the South along the Mississippi River. The North needed cotton and the South needed money.

Given this background, it shouldn't be surprising that there were a group of people in the North that supported the existence of the Union, but were strongly opposed to the war to preserve it. These people were known as the Copperheads and they wanted peace with the South. Politically speaking, they were also Democrats.

Not only did the Northwest and the border states have the Copperheads, but there were also constant rumors of secret societies whose purposes were treasonable. The best known of these were the "Order of the American Knights" and the "Sons of Liberty." The secret societies had elaborate rituals and, in general, their aims were: to render powerless the Union's ability to draft young men for the war; to cooperate with the rebels in the South; and to overthrow the Federal Government.

In order to preserve the Union at any cost and stem the tide of such treasonous sentiments, President Lincoln turned a blind eye to extraordinary arrests and trials by military commission. This meant that with no particular formalities, a person could be taken from his home in the middle of the night and sent to jail in a military fortress. Arrests were made on the slightest of suspicions and the power of little men became great. During this time, William Seward, President Lincoln's Secretary of State, even said to the British Ambassador: "My lord, I can touch a bell on my right hand and order the arrest of a citizen of Ohio; I can touch a bell again and order the arrest of a citizen of New York; and no power on earth except that of the President can release them. Can the Queen of England do so much?" Such was the climate in the early to mid 1860s.

Lambdin P. Milligan was a prominent lawyer from Huntington, Indiana. He placed second in the race for the Democratic nomination for governor of Indiana in 1864. Mr. Milligan was also a leader in the Sons of Liberty. On October 5, 1864, Lambdin Milligan, a civilian and citizen of the State of Indiana, was seized and arrested by the military power of the United States under the authority of Brevet Major General Alvin P. Hovey. Mr. Milligan was not indicted by a grand jury, nor charged and found guilty in a court of law, he was simply taken by General Hovey's men and imprisoned.

> *The BAILIFF enters, followed by the MILITARY TRIBUNAL, the PROSECUTOR, MILLIGAN, and his DEFENSE COUNSEL. The PROSECUTOR, MILLIGAN and the DEFENSE COUNSEL sit at the counsel table, and the BAILIFF and the MILITARY TRIBUNAL assume their positions at the bench.*

NARRATOR

Milligan and other Indiana Sons of Liberty were charged with conspiracy against the United States by denying the authority of the Government to draft men into the army, and by plotting to overthrow the Government by seizing arsenals in Indianapolis, Indiana and two other locations in the Northwest and simultaneously releasing Confederate prisoners held in prisons in those states and arming them to march into Kentucky and Missouri and cooperate with rebel

forces. They were further charged with affording aid and comfort to the rebels; inciting insurrection in Indiana, a state which had been and was constantly threatened to be invaded by the enemy; disloyal practices; and violation of the laws of war. The military wanted Milligan's neck for these crimes. It's now December in the year 1864.

SCENE TWO

PROSECUTOR

Thank you, General Hovey and members of the commission. It seems to be admitted by the counsel for the accused that Mr. Milligan was a member of the Sons of Liberty, had attended their Grand Council, and, therefore, was a third degree member. In addition, he was appointed the rank of major-general in their treasonous rebel military. Upon these points there is no difference of opinion.

The evidence of Mr. Milligan's friends, the witnesses he has introduced upon the stand, have been harmonious upon this one fact, that Mr. Milligan was a bitter partisan, a hater of the Administration, and a leader of the ultra peace wing of the Democratic party. He then enters the Sons of Liberty, an organization that harmonizes with his own sentiments, with his peculiar views as to State rights, State sovereignty, the usurpations of the Administration and the different departments of the Government, and the unconstitutionality of the war, and whose members are the bitter opponents of all the measures to aid in efficiently carrying forward that war.

The only question now, in considering the evidence, is to find the degree of guilt of the accused. That Mr. Milligan is guilty is established the moment you prove that he was a member of the Sons of Liberty; that he assented to the principles and took the obligation of the order. The plea of ignorance, of want of knowledge, and want of assent on the part of the counsel for Mr. Milligan, will not suffice in the case of a man of Mr. Milligan's nerve, energy and intelligence. It is asking this commission to believe an unreasonable thing, to ask it to believe that this man would enter any organization, ascend to its highest degrees, and be endowed with its highest honors, without studying thoroughly the cardinal principles upon which it was based. An ignorant man might; an intelligent man never would.

I now desire to call the attention of the commission particularly to the dangers presented by the Sons of Liberty. Here was the scheme for the uprising, the insurrection, laid down to the members of this order, as early as November, 1863—the Grand Commander of the Sons of Liberty summoned his military chieftains about him, including Milligan, to have a council of war, as to when and how they should put their forces into the field. The object of this council of war was to set the time, the exact day, on which the revolution should take place in this State of Indiana.

Now let us see whether Mr. Milligan's action was consistent with his knowledge of the plans and schemes of the Sons of Liberty. On the 18th of August, 1864, Milligan addressed a convention of 5000 men at Fort Wayne. In that speech, he made the following statements:

He referred to this country as . . .

> *The PROSECUTOR and MILLIGAN speak the following line together, and then MILLIGAN takes up the speech speaking in a fiery manner, trying to rouse the crowd. This is a flashback of when he delivered the speech.*

PROSECUTOR AND MILLIGAN

. . . desolated by war and the oppressions of the Administration.

MILLIGAN

Freedom of speech is nothing more in this country today than the freedom allowed by Lincoln and his mob. It is a freedom in name rather than in fact.

If the war was right and the draft was right, and if good citizens believed the war was right, they would not grumble about the draft. The war is not right. And under the Constitution, the President has no power to coerce a State. I ask you: will those who have entered the army look in the future, for their laurels, to battles such as Bull Run, Chickamauga and Red River? I implore you to consider the condition of your wives and children at home—destitute and dependent on the charity of their neighbors. Do you consider it your duty to make such a sacrifice?

President Lincoln is a tyrant. The war itself is disunion, and the Union itself cannot be restored by war. The war has made the Government a despotism. The war is itself a dissolution of the Government. The Government is a confederation of the several States, not a union.

Does the Government of the United States have the right to make war upon the rebels, or those in rebellion against the General Government?

PROSECUTOR AND MILLIGAN

I deny that right.

> *MILLIGAN sits back down at the counsel table and the PROSECUTOR concludes his argument to the MILITARY TRIBUNAL.*

PROSECUTOR

Here we have from Mr. Milligan's own lips a reiteration to a public assemblage of the cardinal principles of the order itself. Here we have him trying to educate the masses of the Democratic party up to the disloyal standard of this order. The only difference between Mr. Milligan and the most bitter rebel of them all, was

that one was using his arms to enforce his principles, the other his voice and pen attempted to sustain their armies in that cause, weakening the cause of the Government, and adding numbers to the rebel ranks. What more could he do? What would tend more effectually to stir up to insurrection a brave people, than to teach them that their Government was waging an unjust war; that it was forcing them to fight its battles of tyranny and oppression; that this Government was forcing them into her armies by legions, and slaughtering them by thousands, and then citing them to the battle-fields where that Government had been defeated: I ask what more effective mode could have been chosen to give aid and sympathy to the enemy?

I say then, this speech was in entire keeping with the fact that Mr. Milligan must have known of the intentions and plan of the Sons of Liberty for revolution. He was aiding that scheme as effectually as he possibly could. He was sowing the seeds of bitterness in the hearts of the masses, the harvest of which was to be the garnering of the dead bodies of the peaceful citizens, defenseless women and little children of your land.

This is the evidence in reference to Mr. Milligan, for and against him. It all shows that he was really the right arm of this conspiracy in this State; the active, energetic, and venomous leader. A man of unquestioned ability and determination, and with a heart full of hatred, envy and malice, he moved forward in this scheme of revolution with a coolness and intensity of purpose, not exceeded by any other member of the conspiracy. His intelligence and ability gave him a powerful influence for evil, and he used that power to the utmost. Mr. Milligan is nothing short of a conspirator and a traitor.

Thank you, General Hovey, members of the commission.

The MILITARY TRIBUNAL, including GENERAL HOVEY, takes a short time to deliberate. GENERAL HOVEY nods at the BAILIFF, who brings MILLIGAN over to face the MILITARY TRIBUNAL.

TRIBUNAL MEMBER bangs a gavel.

GENERAL HOVEY

Milligan, this commission having maturely considered the evidence introduced finds the accused Lambdin P. Milligan, a citizen of the State of Indiana as follows:

In the case of Lambdin P. Milligan :
Charge 1, Conspiracy against the government of the United States—guilty;
Charge 2, Affording aid and comfort to rebels against the authority of the United States—guilty;
Charge 3, Inciting insurrection—guilty;
Charge 4, Disloyal practices—guilty; and
Charge 5, Violation of the laws of war—guilty.

And the commission does therefore sentence Lambdin P. Milligan, citizen of the State of Indiana as follows: He is to be hanged by the neck until he be dead, at such time and place as the commanding general of this district shall designate; 2/3 of the members of the commission concurring therein.

Mr. Milligan, I have considered the evidence here presented, and I only regret that you have but one life that I may take for my Country. Nathan Hale and other patriots did not die to establish the kind of country in which traitors, like yourself, are free, without just recourse and reprisals, to twist the minds of the impressionable against our government. You have received a just and fair trial, and may God have mercy on your soul.

TRIBUNAL MEMBER bangs a gavel.

The MILITARY TRIBUNAL, including GENERAL HOVEY, rises and exits. The BAILIFF handcuffs MILLIGAN and leads him to the down stage left table, which represents a visiting room in the Jail. MCDONALD enters from the audience and approaches MILLIGAN and DEFENSE COUNSEL.

DEFENSE COUNSEL

Mr. Milligan, Mr. Joseph Ewing McDonald was in the Courtroom during your trial and has agreed to take your case from this point forward.

MILLIGAN and his DEFENSE COUNSEL shake hands. MILLIGAN and MCDONALD shake hands. DEFENSE COUNSEL exits.

MCDONALD

Mr. Milligan, I am sorry for the judgment that was just passed down on you.

MILLIGAN

Bloody hell! I can't believe this is happening!

MCDONALD

I think that this entire trial was a travesty. I don't want to create false hope in you or make you wrongfully optimistic, but, President Lincoln has already agreed to speak to me in the event that you received this sentence. The President and I practiced law together for many years in Illinois. We were partners.

MILLIGAN

I don't understand.

MCDONALD

I am going to visit President Lincoln and ask that he overturn your sentence. Milligan, I don't agree with your beliefs, but this country is founded upon the idea that you are free to believe whatever you want. Furthermore, you are a civilian. You shouldn't have even been tried before this military commission.

I'm sure that I can make President Lincoln understand that. Even if the President will not change your sentence, we will sue out a writ of habeas corpus, demanding that you be set free because a military commission has no power over a private citizen.

MILLIGAN

Thank you, Mr. McDonald.

MCDONALD

You are welcome.

MILLIGAN sits at the table conferring with MCDONALD. The BAILIFF remains standing slightly behind MILLIGAN.

SCENE THREE

NARRATOR

As you've seen, Milligan's attorney had two possible courses of action: (1) to seek clemency from President Lincoln; or (2) to seek a writ of habeas corpus. Clemency is a pardon issued by the President. A writ of habeas corpus allows a prisoner to be brought before a court to determine whether he has been subjected to unlawful imprisonment.

Early during the war in 1862, President Lincoln formally suspended the privilege of the writ of habeas corpus to keep control over dissent in the Union population. Many disagreed that the President could do such a thing, but whether he could or couldn't didn't really matter. During the war, even if a judge issued a writ of habeas corpus, the military simply disregarded it and the prisoners were not allowed to go free.

But things in the North were starting to change. In November 1864, President Lincoln was reelected by a wide margin. The Northwest Confederacy movement collapsed and the Sons of Liberty were bankrupt. The Union troops were scoring victories over the rebels and an end to this bitter war was believed to be in sight. The President, it was thought, wanted to start the healing process and bind the country, rather than punish its potential dividers. Thus, many hoped that he would reconsider his position on the issuance of writs of habeas corpus and this change of heart would benefit Mr. Milligan. Unfortunately, this never came to pass.

SCENE FOUR

NEWSBOY enters and again shouts to audience.

NEWSBOY

Extra! Extra! Read all about it! President Lincoln assassinated last night. Vice President Andrew Johnson immediately sworn in as President. Extra! Extra! Read

all about it!

MCDONALD approaches the newsboy, buys a paper, and considers the headline.

NEWSBOY
(as he exits)
Extra! Extra! Read all about it!

MCDONALD
Oh my God! What is to become of us now? I pray for the salvation of this nation. And what will this mean for my plea that President Lincoln reverse General Hovey's order? Our chances are dashed! I must let Mr. Milligan know of this change in events immediately.

MCDONALD returns to MILLIGAN, who is still seated in the jail's visiting room.

MCDONALD
Mr. Milligan, have you heard the news? The President has been assassinated.

MILLIGAN
Yes, what does that mean for my case?

MCDONALD
Well, there are rumors that John Wilkes Booth was one of your brothers in the Sons of Liberty so I am afraid President Andrew Johnson is going to be out for blood. You know General Hovey's execution order is still sitting on the President's desk to be approved. With the black mood of the country over this assassination, President Johnson will most assuredly not grant you clemency. He is going to have no choice but to sign the order to vindicate what happened to President Lincoln.

MILLIGAN
What do you think of our chances of success if we file a Petition for a Writ of Habeas Corpus?

MCDONALD
Not good. Since President Lincoln suspended habeas proceedings, others have petitioned the courts without much success. Even if a court granted the petition, the military commissions have generally ignored the courts' orders and have done what they please.

MILLIGAN
But I am a civilian. The military commission had no jurisdiction to try me!

MCDONALD
You are right and that will be our primary argument. The federal circuit court

begins its session in Indianapolis on May 1, 1865, so I will begin preparing the writ immediately. We will file it in open court and attempt to stop all of this nonsense before it gets out of hand.

The BAILIFF leads MILLIGAN out, followed by MCDONALD.

SCENE FIVE

NARRATOR

Notwithstanding Milligan's filing a writ of habeas corpus in the circuit court, excitement about his case was building. Never before had a military commission's sentence of death been carried out and it looked like, given President Andrew Johnson's sentiments, Milligan's might be the first. In Milligan's petition for the writ of habeas corpus, he argued that he, a civilian and a resident of Indiana, had been unconstitutionally tried by a military commission and he demanded release from military custody and a trial before a court of law.

Supreme Court Justice David Davis, the Justice assigned to this circuit, was to act as one of the circuit judges to hear Milligan's petition. The other circuit judge on the case was a newly-appointed District Judge, David McDonald. Even before the circuit court heard Milligan's petition, though, Justice Davis' thoughts on this matter were known. He thought it was clear that the military commission that tried Milligan was illegal since the courts of Indiana were open at that time and President Lincoln had not declared martial law.

JUDGE MCDONALD enters and goes to standing writing desk. He picks up a quill pen to make a journal entry.

NARRATOR

But Davis and McDonald were afraid that even if they issued the writ, it would be ignored by General Hovey and Milligan would die. So they came up with a plan, let's listen to Judge McDonald as he records his thoughts on Milligan's case in his journal.

JUDGE MCDONALD
(writing in his journal.)

Tuesday, May 9, 1865.

This morning Judge David Davis arrived and joined me in holding court.

Today it is said that the authorities have fixed on Friday, May 19 instant for hanging Milligan and the other Sons of Liberty tried last fall. I am sorry to hear it, not that they are not traitors but that there is too much doubt of their having been convicted by a court of competent jurisdiction. Justice Davis has the same fears I have on this topic.

But, the rage for blood, now that the war is over increases. And, the mob about town are greatly exercised lest Justice Davis and I release them. But so well

persuaded are we that the execution of Milligan would be impolitic if not illegal, that we will cheerfully take the risk of the popular clamor to do what we must when the application of Milligan is made for writ of habeas corpus.

For us to issue the writ may be fruitless, lest the military authorities ignore it, as they have other such writs issued by the civil courts.

Justice Davis thinks that if the case be brought before the Supreme Court of the United States, the administration would probably not dare to hang the prisoners. At the very least we will try to induce President Johnson to delay the execution till the Supreme Court shall pass on the question.

JUSTICE DAVIS enters and the two judges prepare to take the bench. The BAILIFF enters behind JUSTICE DAVIS.

JUDGE MCDONALD

Good morning, Justice Davis. It is an honor to have you joining me on the bench today.

JUSTICE DAVIS

Thank you, Judge McDonald. It is a pleasure to join you here in Indianapolis for this case that is so important to our nation. It threatens the very heart of the Constitution and the protection of our country's citizenry. Are we ready to proceed in court?

JUDGE MCDONALD

We are, sir.

JUSTICE DAVIS turns to the BAILIFF.

JUSTICE DAVIS

Bailiff, bring in the Petitioner.

JUDGE MCDONALD and JUSTICE DAVIS take the bench. The BAILIFF enters, escorting MILLIGAN to his seat. MCDONALD follows and sits beside MILLIGAN.

BAILIFF

All rise.

MILLIGAN and MCDONALD rise.

BAILIFF

Hear Ye, Hear Ye, on this 10th day of May in the year 1865, the United States Circuit Court for the District of Indiana is now in session. The Honorable David Davis, Associate Justice of the United States Supreme Court and The Honorable David McDonald, District Judge of this Circuit now presiding. All ye who have causes to be heard or claims to be made shall come forward, and you shall be

heard. You may now be seated.

MILLIGAN and MCDONALD sit.

BAILIFF

The first matter on the docket to be heard today is Cause No. 684, *In the Matter of Lambdin P. Milligan.* All those present for Mr. Milligan please come forward and present your case.

MCDONALD stands and goes to the podium.

MCDONALD

May it please the Court.

JUSTICE DAVIS and JUDGE MCDONALD nod in acknowledgment.

MCDONALD

I am Joseph Ewing McDonald from the law firm of McDonald and Roche, and it is my privilege to represent the petitioner Lambdin P. Milligan.

My client, a respected lawyer and well known member of his community, was sound asleep in his bed at his home in Huntington County in the early morning hours of the 5th day of October, 1864, when he and his wife were suddenly awakened by a loud pounding on their door. When Mr. Milligan went to answer the door, despite his wife's desperate protests, he was arrested by the military power of the United States under the authority of the President and was taken into military custody. After his arrest, Mr. Milligan was conveyed from his home in Huntington County to the City of Indianapolis and was placed in prison under a military guard, tried by a military commission, and sentenced to be hanged by the neck until dead, nine days from today, on Friday, the 19th day of May, 1865, between the hours of noon and 3:00 p.m.

Mr. Milligan respectfully represents to you that his Court Martial is a travesty of such significant proportions that it threatens the freedom of all citizens of our great nation and contravenes the intent of our ancestors in drafting our nation's Constitution. Mr. Milligan is a natural born citizen of the United States and has for nearly 20 years been a citizen of this District and the State of Indiana. As such, he is entitled to all the rights, privileges and immunities of citizens of the United States. Mr. Milligan has not been in the military service of the United States at any time.

Be it known that through this Petition for Writ of Habeas Corpus, Mr. Milligan questions the jurisdictional authority of the military commission that entered Court Martial Order No. 214. We maintain that the commission was without jurisdiction to enter any order against my client as he was not serving in the military of the United States government at the time the court martial was issued

and marshal law had not been imposed upon the State, it not being a theater of war. To order death by hanging, not by a unanimous decision, but by a 2/3 vote, after a trial by a military commission without any civil court intervention and judgment by a jury of his peers is a violation of Mr. Milligan's constitutional rights as a citizen of this great democracy.

Although the facts upon which Mr. Milligan was tried before the military commission have been long known to the lawmen of this state and judicial circuit, this civil court has yet to see the necessity of charging Mr. Milligan with any unlawful acts, much less conspiracy to commit treason against his own government. After Mr. Milligan was found guilty by the military commission, this Circuit Court, on the 2nd day of January, 1865 convened in this very courthouse a legal and proper grand jury. The grand jury was duly impaneled, sworn and charged to inquire within and for the District of Indiana and make presentment of all crimes and misdemeanors committed by Mr. Milligan against the laws of the United States and this country's peace and dignity.

When the term of this Court ended on the 27th day of January, 1865, the grand jury had not found any bill of indictment or made any presentment whatever against Mr. Milligan for any offense; and no bill of indictment or presentment has ever been found or made against Mr. Milligan since his imprisonment. Today in the eyes of the civil court he remains a free man. Would such a court let a man go free if he had engaged in the reprehensible conduct as prescribed?

In his humble Petition to this honorable Court, Mr. Milligan prays that he be delivered from military custody and imprisonment and turned over to the proper civil commission for inquiry and punishment according to law, or for discharge from custody altogether.

Earlier this year, prior to the untimely and tragic death of President Lincoln, I met with the President on my client's behalf. President Lincoln reviewed the order of the military commission and suggested certain errors and imperfections in the record. The President advised me the papers would be returned for correction and that he would send for me when he received the corrected papers. He then turned to me and said, "but I apprehend and hope there will be such a jubilee over yonder," pointing to the hills of Virginia just across the river, that "we shall none of us want any more killing done." It was apparent to me from the President's last words with me that he believed a great injustice had been rendered by the military commission. Although the President did not opine as to the guilt or innocence of Mr. Milligan, I believe it was his intent to disapprove the final order of General Hovey, nevertheless, the President indicated, "however, I will still keep them in prison awhile to keep them from killing the new government."

I ask you now to carry through with President Lincoln's intentions and do what he could not accomplish before his death: grant this man, Lambdin P. Milligan, freedom from his military captors, and afford Mr. Milligan his guaranteed due process rights, the right to have his actions considered by a grand jury, and if

indicted, the right to a subsequent civil trial by a jury of his peers, not members of the United States' military. And if Mr. Milligan is found guilty in a civil court, that he be found guilty by a unanimous decision, not a mere two-thirds vote. These are rights upon which this nation was based. For our government to dispense with these rights in a time of insurrection is a very sad and disheartening commentary on our true devotion to freedom and liberty. Therefore, we respectfully request that you grant Mr. Milligan's petition. Thank you gentlemen for your consideration today and God speed.

JUSTICE DAVIS

Thank you, counsel.

JUSTICE DAVID and JUDGE MCDONALD confer. MCDONALD remains at the podium.

NARRATOR

As you've heard, if the circuit judges agreed that an injustice had been committed and granted the writ of habeas corpus, they still had the problem that General Hovey could ignore the court's order. But Justice Davis thought that if the Supreme Court heard the case, the military would probably not hang poor Mr. Milligan. Under the law, if the two judges of the Circuit Court were opposed to each other on any question, they might present it to the Supreme Court and have it answered. Justice Davis had no problem convincing Judge McDonald to oppose him on the basic issue of the unconstitutionality of the military commission's jurisdiction.

JUSTICE DAVIS

Counsel?

MCDONALD

May it please the Court, on behalf of Lambdin P. Milligan, I move for certification of the question that has divided this Court to the Supreme Court of the United States.

JUSTICE DAVIS

The court being equally divided, on motion of Milligan, by counsel, it is ordered that the said petition, together with the following question, be certified to the Supreme Court of the United States for their decision:

Whether, upon the facts stated in the petition, the military commission had jurisdiction legally to try and sentence Lambdin P. Milligan.

It is so ordered, this 10th day of May, 1865. Court is adjourned.

JUSTICE DAVIS bangs gavel.

BAILIFF

All rise.

JUDGE MCDONALD exits; JUSTICE DAVIS moves to the standing writing desk. MILLIGAN and MCDONALD are escorted to downstage left table by the BAILIFF. All three remain on stage.

BAILIFF

You may be seated.

SCENE SEVEN

NARRATOR

The Supreme Court took the case and heard several days of argument in 1866. Justice Davis wrote the opinion.

JUSTICE DAVIS

(writing)

Did the military commission have jurisdiction to try and sentence Milligan? Milligan did not reside in a rebel state nor was he a prisoner of war. Milligan was a private citizen of Indiana when he was arrested in his home by the United States Military. He was imprisoned, tried, convicted, and sentenced to be hanged by a military commission. Did this commission have the legal power and authority to try and punish this man?

No graver question has ever been considered by this Court because it involves the very framework of the government and the fundamental principles of American liberty.

JUSTICE DAVIS moves from the writing desk and addresses the audience directly.

JUSTICE DAVIS

During the Rebellion, the spirit of the time did not allow for calm deliberation and discussion which is so necessary for a correct conclusion of a purely judicial question. But the war is over and public safety is assured. Now we can consider without passion or politics the question before the Court.

Our Constitution is a law for rulers and people alike, equally potent in war and in peace. It is the Constitution which guides our deliberation.

The Constitution provides that the trial of all crimes shall be by jury. The Fourth Amendment protects all Americans against unreasonable search and seizure. The Fifth Amendment provides that no one shall answer for a federal criminal charge without first being charged, indicted by a grand jury. The Fifth Amendment also provides that no person shall be deprived of life, liberty, or property without due process of law. And the Sixth Amendment guarantees to a criminal defendant the right to a speedy trial by an impartial jury.

Have any of these rights been violated in the case of Milligan? That answer must be yes.

JUSTICE DAVIS' voice is heard on a recording as he takes the bench of the U.S. Supreme Court. Meanwhile, in the visiting room of the Jail, the BAILIFF hands MCDONALD an envelope containing the opinion of the Supreme Court. MCDONALD reviews it and shows it to MILLIGAN, who reads the Court's opinion while it is being delivered.

JUSTICE DAVIS

Martial Law cannot be applied to citizens in states which upheld the authority of the Union and where the courts are open and their process unobstructed. In Indiana the Union was not opposed and the courts of Indiana were always open during the Rebellion to hear criminal trials under the laws of the United States.

Why wasn't Milligan brought before the Circuit Court of Indiana and prosecuted before that august body? There was no necessity to rush a trial. Soon after the military commission was ended, the Circuit Court of Indiana met, heard cases, and adjourned. The Circuit Court was held in a state, eminently distinguished for patriotism, by judges commissioned by our President, who were provided with upright and intelligent juries.

Thus, another guarantee of freedom was broken when Milligan was denied a trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufference, and cannot be frittered away by any political necessity.

NARRATOR

Mr. Justice Davis delivered the opinion of the Court.

JUSTICE DAVIS

Martial law cannot arise from a threat of invasion and a threat of invasion is all that was asserted in this case. To allow martial law in such a case would destroy every guarantee of the Constitution. To allow martial law, the danger must be actual and present; the invasion real. It must be an invasion which closes the courts and the civil government. When Milligan was arrested, the courts were not closed in Indiana, nor the civil government suspended when Milligan was arrested. If any citizen of Indiana was plotting treason, the power of arrest by civil authorities could secure them, until the government was prepared for their trial, when the courts were open and ready to try them.

If the claim of martial law were sustained by this Court in this case, it could be said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so.

Therefore, on the question of whether the military commission had power and authority to try and sentence Milligan, this Court must answer no. The petitioner shall be discharged. It is so ordered.

JUSTICE DAVIS bangs gavel.

MCDONALD

(shaking MILLIGAN's hand)

Congratulations Mr. Milligan, you're a free man.

MILLIGAN

Thank you, Mr. McDonald.

NARRATOR

After Milligan was set free, he sued General Hovey for unlawful imprisonment. The jury awarded him $5.00.

Milligan was tried for treason during a time of war by a military commission, not a court, at a time that the courts were open and functioning. This, the Supreme Court condemned. Is history doomed to repeat itself? You be the judge.

The End

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United States Court House and Post Office circa 1919, Indianapolis, Indiana

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THE UNITED STATES COURT HOUSE IN INDIANAPOLIS

PERRY R. SECREST*

In 2003, the Historical Society of the United States District Court for the Southern District of Indiana celebrated the centennial of the Court House[1] in Indianapolis with a series of events including the court history symposium which is the subject of this issue of the *Indiana Law Review*. Generally admired as a landmark in the historical, architectural, and artistic heritage of Indianapolis and Indiana, the Court House has a special claim on the hearts and minds of the Indiana legal community. It is there that much of the professional life of the bench and bar has been focused and it provides a widely-recognized, indeed magnificent, physical symbol of the intangible federal justice that is administered therein. But while many in the legal community express a fondness for the building, few know its history or the details of its architectural and artistic character that make it so noteworthy. As the setting for much of the legal history that is discussed in this issue of the *Indiana Law Review* and the cherished home of federal justice in southern Indiana, the United States Court House merits historical attention itself. This Article highlights parts of the building's history and character that are of most interest to the bench and bar.

The United States Court House was only the second unified federal building to be built in Indiana. The first opened for business in 1860 at the southeast corner of Pennsylvania and Market Streets in Indianapolis, one block south of the current building.[2] Until this building opened, Indiana's federal courts had no home of their own; judges borrowed the Indiana Supreme Court's courtroom for their proceedings in Indianapolis and presumably borrowed local courtrooms while riding the circuit of divisions around the state. The 1860 building was designed in the newly-created office of the Supervising Architect of the Treasury which had been established to assure high quality design and construction of federal facilities by bringing the design process in-house and establishing uniform standards. All federal offices in Indianapolis, including the post office and the courts, were consolidated for the first time in this building which shifted the center of business activity in the city farther to the east away from Illinois and Washington Streets.

The 1860 Court House received a baptism by fire as it quickly became the focal point for some of the most contentious legal disputes of the Civil War era, such as fugitive slave cases and prosecutions of southern sympathizers, culminating in the most famous and divisive federal case originating in this

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* Mr. Secrest is an attorney with the district court. The author appreciates the comments on the manuscript offered by Judge Sarah Evans Barker of the district court and Elizabeth Brand Monroe, associate professor of history and director of the public history program at Indiana University-Purdue University—Indianapolis.

1. The historic and formal name of the building at its inception is the "United States Court House and Post Office." For purposes of this Article, "Court House" and "Post Office" will be used in reference to the building.

2. The Union Federal Bank building, 45 North Pennsylvania Street, currently occupies the site.

district, *Ex parte Milligan*.[3] After the Civil War, power began to shift to the national government from the states with a resulting growth in federal legislation and bureaucracy. So began a trend of continual strain on federal facilities that continues today. After renting more and more space to house more and more government employees, Congress finally authorized construction of a new federal building in Indianapolis at the turn of the century.[4]

John Hall Rankin and Thomas M. Kellogg, principals of the new Philadelphia architectural firm of Rankin & Kellogg, created the building's design which was awarded a silver medal at the 1904 World's Fair (Louisiana Purchase Exposition). Ground was broken in May 1902 and the cornerstone was laid on March 25, 1903 as the climax of a day of celebration in the city that included festooned buildings, a large parade, and an official ceremony attended by most of the community's federal, state, and city leaders.[5] Postcards showing the architects' rendering of the impressive facade had been circulating in the city, whetting its appetite for what was to come. In his address, delivered in the shadow of the hoisted limestone cornerstone, Congressman Jesse Overstreet voiced the civic pride that most of the audience felt that day:

> It is fitting that in architecture, convenience and equipment this edifice should meet the demands of the future as well as the needs of the present. Erected upon a magnificent site, unexcelled in the country, the beauty of the structure will be equal to its utility, and both will be as lasting as time. The characteristics of beauty and utility can be appropriately applied to our city within which this building will stand. It is a city of an industrious, honest and energetic people. A city of homes, and churches, and schools, within which truth, thrift and patriotism are taught. We are highly honored and complimented by this act of the Government and shall take an honest pride in our share of the business which may be here transacted. Our people will be benefitted by the building and its business, and the Government will not suffer by the confidence imposed.[6]

Two years and nearly two million dollars later, the United States Court House

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3. 71 U.S. (4 Wall.) 2 (1866).

4. The 1860 Court House did not long survive its centennial. After the federal government moved out, the building was occupied by a succession of banks and other tenants. When plans to demolish the structure became known, a rescue effort by concerned architects, historians, and community leaders failed and the building was demolished in 1962. The campaign drew attention to the issue of preservation, however, and the *ad hoc* group's campaign became institutionalized and well-funded in 1963 with the establishment of the Historic Landmarks Foundation of Indiana which has been responsible for saving and restoring many historic Hoosier properties. *Group to "Save" Area Landmarks*, INDIANAPOLIS STAR, Jan. 30, 1963, at 17.

5. *Corner Stone Formally Laid, Various Civic and Military Organizations and Prominent Citizens Participated*, INDIANAPOLIS NEWS, Mar. 25, 1903, at 1 [hereinafter *Corner Stone Formally Laid*]; *Picture of Parade Put in Cornerstone*, INDIANAPOLIS NEWS, Mar. 26, 1903, at 4; *With Fitting Ceremony, Federal Building Corner Stone Was Laid*, INDIANAPOLIS SUN, Mar. 24, 1903, at 1.

6. *Corner Stone Formally Laid*, *supra* note 5, at 1.

and Post Office opened for business in September 1905. It impressed visitors with its massiveness and beauty. Occupying an entire city block, the limestone building rose four stories on a surrounding granite-balustraded terrace, and the entrance front was set back from the street behind a grass and concrete plaza. The building housed 925 federal employees in the Post Office, the courts, and other federal offices, including overnight accommodations for approximately 400 railroad postal workers when laying-over in the city. The finest materials went into the Court House's construction — including Indiana limestone and granite on the exterior and costly marbles imported from around the world on the interior — and accomplished artists and artisans of the day decorated the building with sculptures, mosaics, ornate stone and wood moldings, stained-glass windows and skylights, murals, decorative painting, and bronze and brass fixtures. The quantity and beauty of rare and expensive materials and sophisticated design and ornament was something new to the city and proclaimed the importance of the building in the life of the city and the state.

The architectural style of the Court House and Post Office is Beaux Arts Classicism. Also known as Neo-Classical, architects used this style during the late Nineteenth and early Twentieth Centuries for upper-value residential, commercial, and especially governmental structures. Here, it also provides an allusion to Rome, the origin of our civil law and republican government. The popularity of this style in America originated with the 1893 World's Fair in Chicago — where, for the first time, the designers of the principal buildings adhered to a uniform style — and was propagated throughout the country for public buildings through the work of prominent architectural firms such as McKim, Mead & White and Rankin & Kellogg. Characteristics of this style, plainly evident in the Court House, include large limestone block walls, a granite base (rustic), Roman orders of columns and pilasters, heavy ornate entablature, roof balustrade, flat roof, symmetrical elevations, and monumental pedimented entrances at the top of long, broad flights of stone steps. Another common Beaux-Arts feature is the four allegorical limestone statues flanking the front entrances. Sculpted by John Massey Rhind, a Scottish artist who executed many public works in America, the statues represent Agriculture, Literature, Justice, and Industry. Like a Roman temple or basilica, the Court House sits atop an elevated granite terrace ringed with large bronze lampposts. The building met with such acclaim that it helped to inspire Beaux Arts designs for other public buildings in Indianapolis, including the City Hall (1910), the Indianapolis–Marion County Public Library (1917), and buildings in the Indiana World War Memorial Plaza (1922–1950).

The interior of the Court House and Post Office has an Italian Renaissance expression that begins its calculated effect on the senses at the thresholds. Passing through the porticos, one enters the vestibules with their yellow-gray marble walls, rows of solid-marble columns, and barrel-vaulted ceilings of ornate limestone coffers. The visitor immediately senses that he is entering a place of importance, power, and stability. The vestibules lead to octagonal rotundae with red marble walls, bronze shell-arched niches, and domed ceilings of beautifully-colored glass mosaics depicting classical symbols, such as the fasces, caduceus, scales, and Pegasus representing governmental power, communication, commerce, swift travel, and justice. These and other symbols repeated

throughout the building represented the agencies housed in the building, their missions, and their guiding ideals and values. The rotundae lead into the lofty first-floor corridors that are walled with marbles and topped by barrel vaults covered with more glass and marble mosaics depicting classical and Renaissance motifs and highlighted by shimmering brass chandeliers and sconces. In today's richer, better-traveled, and faster-paced world, whose city skylines are crowded with sleek and towering structures, these details are often overlooked or taken for granted, but the earlier visitor would have examined all in amazement and found them both moving and inspiring.

The first floor was the domain of the Post Office as evidenced by the restored tellers' cages and service windows in the main cross corridor. By far the largest and most-visited tenant when the Court House opened in 1905, the Post Office was the primary means of communicating, diffusing knowledge, transferring money, and facilitating commerce and industry before the time of telephones, U.P.S., FederalExpress, e-mail, and electronic transfers.

At each end of the building, a cantilevered semi-circular marble staircase topped by a ribbed half-dome and fishscale stained-glass skylight leads to the second floor, known as the "court floor" when the building opened. Sets of heavy bronze gates, still in place, restricted access to the upper floors on evenings and weekends when only the Post Office was open. With only one district judge for the entire state in 1905, the court did not require a great deal of office space and all judicial and legal offices of the United States fit easily on the second floor:[7] two courtrooms with accompanying chambers in the south (front) wing, the clerk of courts and United States Attorney in the west wing, and rooms for the United States marshal (including detention cells), bailiffs, and witnesses in the east wing.[8]

Although only one district judge served at the time, a second courtroom and chambers were included in the design in order to accommodate the itinerant circuit court.[9] The original district court courtroom is Room 202, now referred

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7. From the creation of the United States District Court for the District of Indiana in 1817 until 1925, Indiana had only one district court and one district judge for the entire state. A second judge was appointed in 1925 and served until 1928 when the state was divided into two districts: the Northern District of Indiana and Southern District of Indiana. The second, junior, judge was then reassigned to the Northern District as its first judge. The Southern District continued with only one judge until 1954 when a second judge was authorized for the Southern District. Federal Judicial Center, *History of the Federal Judiciary, U.S. District Courts of Indiana: Legislative History, available at* http://www.fjc.gov/newweb/jnetweb.nsf/fjc_history?OpenFramSet (last visited Mar. 25, 2004).

8. As explained farther on, the original building was U-shaped and smaller than the current building. The 1936 expansion extended the sides of the building and added the north wing, filling out the block. The original length of the east and west wings is still indicated in the east hall of the second floor where the original marble walls and floors meet the terrazzo floors and plaster walls of the 1936 addition.

9. From the passage of the first Judiciary Act in 1789, each justice of the United States Supreme Court was assigned to a circuit consisting of a regional group of states. Twice each year,

to as the "William E. Steckler Memorial Courtroom" and currently the courtroom of Chief Judge Larry J. McKinney.[10] The original circuit court courtroom is Room 216, now in use by Judge Sarah Evans Barker.[11] Sitting at opposite ends of the south wing, these original courtrooms are mirror copies of each other in design but differ in materials and ornament. They are expansive rooms horizontally and vertically, rising through the fourth floor. Natural light enters each courtroom through two large stained-glass windows designed and built by Otto Heinigke of New York City in an Italian renaissance "cinquecento" (Sixteenth Century) style, the best surviving exemplars of his scarce work in the midwest. Large central skylights originally provided additional natural light but maintenance difficulties long ago forced their conversion to artificial light wells. The skylights' ceiling frames survive and their leaded glass coverings were recently reproduced. Brass and glass-globed sconces, recently reproduced, give supplemental artificial light. Each courtroom is traditionally arranged on a

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each justice was expected to "ride the circuit" holding a session of court in each district of his assigned circuit. (The circuit courts are sometimes denominated by district, *e.g.*, "Circuit Court for the District of Indiana", and sometimes by circuit, *e.g.*, "Circuit Court of the United States for the Seventh Judicial Circuit".) The circuit courts' jurisdiction covered most federal crimes, diversity suits, and civil suits brought against the United States, including *habeas corpus* suits. The circuit courts also heard appeals of most civil suits from the district courts. As the caseload of the United States Supreme Court grew, the justices found it increasingly difficult to meet their obligations as circuit justices which resulted in missed sessions of court and cases delayed to successive terms. In response, Congress expanded the circuit court benches to include the resident district judges with the proviso that either judge could exercise the full jurisdiction of the circuit court in the absence of the other. As caseloads (and complaints about district judges sitting alone hearing appeals from their own decisions) increased, the circuit bench was again expanded by adding a newly-created "circuit judge" who was assigned only to the circuit court and thus continually rode the circuit. In 1891, Congress created the current courts of appeals for each circuit and transferred to them the appellate jurisdiction of the circuit courts and the circuit judges. The trial jurisdiction of the circuit courts continued until the final abolition of the circuit courts in 1912. The abolition left the three-level system that exists today. One vestige of the circuit court system that survives is the continued circuit assignment of each supreme court justice, albeit for different purposes. ERWIN C. SURRENCY, HISTORY OF THE FEDERAL COURTS 35-64, 66-68, 83, 85-92 (2d ed. 2002); Federal Judicial Center, *supra* note 7.

10. The courtroom is named in memory of Judge Steckler who presided there from the time of his appointment by President Harry S. Truman in 1950 until a brief period before his death in 1994. Judge Steckler was only the third district judge to sit in the building, succeeding Albert Anderson, who moved from the 1860 Court House, and Robert C. Baltzell, who served from 1925 to 1950. (Thomas Whitten Slick also served for a brief period from 1925 until his transfer to the new Northern District in 1928). Judge Steckler was the last judge to serve alone as district judge for the Southern District.

11. Appointed in 1984, Judge Barker succeeded to the seat and courtroom of Judge Cale James Holder who was appointed to the bench in 1954 and died suddenly while still in office. From the abolition of the circuit court in 1912, this courtroom was vacant until occupied by Judge Thomas Whitten Slick from 1925 until his transfer to the Northern District in 1928. The courtroom then sat vacant again until Judge Holder's appointment.

central axis starting from the central aisle in the public gallery, through the bronze and wood balustrade separating the gallery from the rest of the courtroom (the "bar" before which only attorneys may practice), through the well of the court occupied by the counsel tables and podium, and terminating at the centrally-placed bench at center front.[12] On either side of the wells of the courtrooms are the jury and witness boxes and clerks' desks. The magnificent expanse of the rooms, the ornate stained glass, lush decoration, and progressive hierarchical axial floor plan are similar to traditional church design at the time and aim at evoking similar effects of awe, respect, quiet attention, and reduced ego on the part of all who enter and labor there.

The large allegorical murals behind each bench were painted by W. B. Van Ingen, a Philadelphia artist who also produced works for the Library of Congress, the United States Mint, the Pennsylvania State Capitol building, and the United States Post Office building in Chicago.[13] The bench mural in the district courtroom is titled "Appeal to Justice" and while a title for the mural in the circuit courtroom has not been found, we know that Van Ingen intended to show in that mural that judges, while the ultimate authority in the courtroom, are still servants of justice.[14] The district courtroom contains original frieze murals

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12. A photograph of the district courtroom taken sometime before mid-1907 shows a bench at least twice as long as the current one with a smaller ornate clerk's desk positioned on the floor in front of it. At some point, the footprint of the elevated dais was reduced and a smaller bench was constructed, possibly remodeled from the original. The 1907 photograph and another one of the Judges' Library also show that the current counsel tables in the Steckler Courtroom are original to the Court House and the courtroom. The courtroom photograph shows the public gallery with rows of individual theater-style seats; it is not known when they were replaced with the current wood pews. The 1907 photograph also shows an elevated witness chair and two-tiered jury range as today but both are open, without "box" railings. Judge Steckler ordered construction of the current wood enclosures when women's fashions turned to shorter skirts. No photograph showing the original appearance of the circuit courtroom has been discovered.

13. The Van Ingen bench murals were installed in August 1907, two years after the building opened. They replaced the original murals painted by Nicola D'Ascenzo, who had also painted the frieze murals in the district courtroom. A newspaper article at the time reported that the D'Ascenzo murals were judged "not altogether satisfactory", without further explanation. *Paintings Hung in Federal Building*, INDIANAPOLIS STAR, Aug. 4, 1907, at 36. Van Ingen was also hired to tint the walls of the courtrooms (some of which survives in the district courtroom around the bench mural and in the narrow verticals in the corners between the pilasters) and to direct the hanging of velvet curtains at the stained-glass windows "to add to the acoustics of the rooms." *Id.* The curtains have been removed.

14. The mural in the circuit courtroom depicts two allegorical female figures in a classical setting. "Justice" holds a balancing scale and sits on a monumental plinth atop a flight of stone steps that suggests the Rhind statues along the front of the Court House. A few steps below Justice stands the "Judge" facing outwards and gesturing toward Justice. Van Ingen himself described his intentions for this mural in a newspaper report on its unveiling: "The figure in front is a representative of justice who sits waiting to weigh in the balances each case. The fore figure is appealing to persons not in the picture, telling them that justice is to be done. The judge who sits

painted by Nicola D'Ascenzo, an Italian immigrant artist based in Philadelphia. The side and rear wall murals are on plaster and depict the seals of the thirteen original colonies. The three bench wall panels are on canvas and depict the seal of Indiana in the center flanked by panels representing arts and industry.

The large lobbies lined with white marble walls and columns that greet visitors approaching each courtroom are connected by a broad marble-lined hallway extending from east to west along the full length of the south wing. While impressive in themselves, the lobbies and hallway served a very practical purpose at the time and tell a history themselves. Until relatively recent times, the district court did not continuously sit and remain open for business. When the building opened, the court sat only twice a year, at May and November terms. Before a particular term opened, the court published a list of pending cases and instructed attorneys who had business before the court to be present and ready to proceed when the term opened. A court crier emerged from the courtroom to call the pending cases in docket order. Unlike today, most court practice was not conducted in writing and according to scheduled appointments, but orally in open court as the cases were called *seriatim*. The judge opened court at a set time each day, heard the attorneys argue motions or other matters as they were called, and then, in open court, issued his decisions and orders thereon which the clerk of court recorded in the order book. With this type of on-call court practice, large comfortable lobbies and hallways were necessary to accommodate what must have been a bustling crowd of waiting attorneys, parties, family and friends, witnesses, reporters, and other interested persons and spectators. After progressing through the roll of cases enough times to dispatch the pending pre-trial business, the judge held jury and bench trials and then issued his written bench decisions. The term in Indianapolis having closed, the judge and clerk rode the circuit of judicial divisions around the state. After divisional business was completed, there was often significant time remaining before the next term of court opened which allowed the judge to attend to other matters such as teaching law.

A sad loss in this precinct was the Judges' Library originally located between the district and circuit judges' chambers in the middle of the south (front) wing. A large room with wood paneling, bookcases, and fine furniture centered on an ornate marble and mahogany fireplace, the room was remodeled in the 1950s to serve as the home-state chambers for a court of appeals judge. The space was divided by walls and the original decorative ceiling was painted over and had a suspended ceiling anchored to it. This decorative ceiling copied a fresco painted by the Renaissance artist Pinturicchio on a ceiling in the Palazzo dei Penitenzieri in Rome.[15] The fireplace survives, however, as does a small portion of the wall

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on that bench is merely a representative of justice and in the painting I tried to portray his position toward justice." *Id.* Today, Van Ingen's choice of model is more prescient than his pronoun: the bench located in front of this mural is now occupied by Judge Sarah Evans Barker, the first woman appointed to the federal bench in Indiana.

15. Ranking & Kellogg, Specifications for Certain Proposed Mural Painting and Decoration in the New U.S. Court House and Post Office at Indianapolis, Indiana (on file with author);

moldings. The adjacent chambers now utilize the rooms.[16]

As the United States grew in population, wealth, and importance with the progress of the new century and the federal government expanded, the Court House and Post Office building began to run out of space to hold its many tenants. In 1936, the architectural firm of McGuire and Shook designed and oversaw the construction of the north addition which expanded the building to the northern edge of the city block. Their design extended the original pilastered sides and closed the square footprint with a north wing expressing a classical Palladian facade. A fifth-floor penthouse was added above this north wing and two driveway portals at each end gave access to the postal loading dock below.

This 1930s expansion also marked a shift in the artists and the art of the building. Whereas primarily east-coast artists contributed traditional classical ornament and themes to the original building, the 1930s brought to the building the work mostly of midwestern and Hoosier artists who depicted contemporary, historic Indiana, postal, and other realistic, non-allegorical themes. The architects of the north-side expansion, William C. McGuire and Wilbur B. Shook, were Hoosiers whose firm was located in Indianapolis. David K. Rubins, an instructor at the Herron Art Institute in Indianapolis, carved in place the limestone spandrels and keystones over the driveway portals in 1939.[17] In 1935-36, Grant Christian, a young art student at Herron, painted nine panels of murals depicting Post Office and Indianapolis themes pursuant to a Treasury Relief Art Project commission. And, under another Great Depression-era program, Sidney Newton Sanner, an Indiana resident at the time, painted frieze murals for the then-unused circuit courtroom. The murals are heraldic designs bearing the surnames of thirteen United States Supreme Court justices and were painted in the same style and color schemes as the D'Ascenzo murals in the district courtroom.[18] So far, it is a mystery why the particular justices were selected for

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Subcontract Proposal, Chapman Decorative Co. to John Peirce [Co.], Apr. 19, 1905; Contract Proposal, John Peirce [Co.] to Rankin & Kellogg, May 5, 1905; Proposal Acceptance, United States Treasury Department to John Peirce [Co.], June 7, 1905. Cardinal Domenico della Rovere built the palazzo in 1480 as his residence. It eventually became the home of the "penitenzieri", the priests who heard confessions and administered penance at St. Peter's Basilica and it was still so used when the Court House was constructed. The Palazzo survives today on the Via Conciliazione just outside the Vatican City and is now mostly occupied by the Hotel Columbus. The Pinturicchio ceilings reportedly also survive. JULIAN KLACZKO, ROME AND THE RENAISSANCE: THE PONTIFICATE OF JULIUS II 239 (1903).

16. Nothing remains of the original Clerk's offices along the outer side of the west hallway, now mostly occupied by the Tax Court Courtroom and offices. The original United States Attorney's space on the inside of the west hallway also does not survive, except for what might be the fairly in-tact office of the United States Attorney at the south end. Little, if any, trace remains of the original offices along the east hallway.

17. Mr. Rubins is also known for sculpting the statue of Abraham Lincoln as a boy which sits on the Indiana State House lawn and the bronze cherub which appears every Christmas on the old L. S. Ayres & Company clock at the southwest corner of Meridian and Washington Streets.

18. The Sanner murals were unexpectedly discovered five years ago during repairs to part of

inclusion in the murals. This courtroom was returned to active service with the appointment of Judge Cale J. Holder in 1954 when he became the second judge for the Southern District.

In 1961, Congress expanded the district court bench again and a third courtroom, Room 243, was built for the new appointee, Judge S. Hugh Dillin, on the inside expanse of the north wing of the second floor. The simplicity and plainness of this courtroom, compared to the original district and circuit courtrooms, represents the change not only in tastes in the sixty years since the Court House opened but also in the gradually diminishing role of architecture and design in public buildings since the beginning of the century. This courtroom is characterized by flat surfaces, minimal decorative trim and moldings,[19] and no ornamental fixtures or decorative artwork. A further expansion of the number of authorized judgeships in 1966 brought Judge James E. Noland and, thus, a fourth courtroom, Room 307, to the Court House.[20] Now designated as the James E. Noland Memorial Courtroom, this courtroom was built with a longer-than-usual bench in order to accommodate multi-judge hearings.[21] Following the construction of Judge Dillin's courtroom by only a few years, the design of Judge Noland's courtroom adheres to the same bare, utilitarian style, but lacks even the minimal decorative trim and moldings of Judge Dillin's courtroom. With this courtroom and chambers in the south wing of the third floor, the district court started its gradual expansion beyond the original "court floor."

With the growth of the executive and judicial branches in the 1960s and '70s, the Court House was again bursting at the seams. The court continued to expand with the addition of full-time magistrate judges starting in 1971[22] and bankruptcy judges in 1979.[23] In 1973, the Court House lost its largest tenant when the Post

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the wall plaster in the courtroom. They have been beautifully restored. Unfortunately, it was also discovered that the three canvas panels on the bench wall of the courtroom were missing. Copies of the panels in the same position in the district courtroom were installed as part of the restoration work.

19. The decorative trim is in the same blond wood as the wall surfaces and furniture and consists primarily of "floating" pediments applied to the walls over the doors and behind the bench and picture-frame trim dividing the walls into panels. In the 1990s, the original flat suspended tile ceiling and lighting was enhanced with wood beams and new lighting and sound systems.

20. Room 307 is currently the courtroom of Judge John Daniel Tinder. Judge Tinder was appointed to the bench in 1987 upon Judge Noland's assumption of senior status. Judge Noland moved to the senior judge's chambers, without courtroom, that had been constructed in the west wing of the third floor (currently the chambers of Recalled Magistrate Judge John Paul Godich).

21. Until 1976, all federal constitutional challenges to state statutes that sought injunctive relief were heard by panels of three judges. There are fewer occasions for three-judge panels today. The last one in the Southern District was a state reapportionment case heard and decided in Judge Noland's courtroom in 1986.

22. One full-time magistrate judge position was authorized in 1971, a second in 1973, a third in 1979, and a fourth in 1988. Today, three full-time magistrate judges sit in Indianapolis and one sits in Evansville. Two recalled magistrate judges also sit in Indianapolis.

23. Three bankruptcy judges were appointed in 1979 and a fourth in 1980. Today, three

Office moved to a new main facility at South and Capitol Streets and, in 1979, most executive-branch offices moved to the new six-story Minton–Capehart Federal Building three blocks north at Michigan and Pennsylvania Streets.

A fifth district courtroom, Room 344, and chambers were constructed in the north wing of the third floor in 1985 in anticipation of future needs which quickly presented themselves when Judge Steckler took senior status and Judge Larry J. McKinney was appointed to the court.[24] This fifth courtroom continued the plain, utilitarian style of the third and fourth courtrooms and continued the court's expansion into the third floor.

The most recent major events in the history of the Court House were the extensive restorations and remodelings in the 1990s. Significant historical losses had occurred in the Court House fabric in the 1960s. A program of maintenance simplification and utilitarianism resulted in the removal and disposal of the original ornate brass chandeliers and sconces except for those in the south (front) wing of the second floor, the "court hallway". Round disks housing floodlights, popularly known in the building as "flying saucers," replaced the chandeliers in the first-floor main cross corridor and industrial-style florescent fixtures replaced them elsewhere in the building. The postal tellers' cages and windows were removed from the main cross corridor; the decorative wall and ceiling painting, including hand-painted laurel-leaf garland borders in the stairwells and the second-floor court hallway, disappeared under layers of overpainting; and aluminum and glass fire walls and doors closed the elevator and stair lobbies. In the 1990s, the General Services Administration, the civilian federal government's landlord and the Court House's property manager, began an expensive and carefully-executed restoration of much of the building that continues today. The original light fixtures were reproduced, the decorative painting throughout the building was painstakingly uncovered and restored, and various details, such as the teller's cages, were reproduced. After a century of exposure to environmental and structural deterioration and poor maintenance, the Heinigke stained-glass windows in the original courtrooms were removed and shipped to Illinois for repair, cleaning, and restoration and were re-installed in the late 1990s along with protective outer windows. Additionally, the D'Ascenzo and Christian murals were cleaned and conserved. Today, visitors to the Court House are able to see more of the original character of the building from its opening in 1905 than has been possible for at least four decades.

The 1990s also saw a comprehensive remodeling of the north sides of the second and third floors. Three new chambers and courtrooms were constructed for magistrate judges on the second floor and new courtrooms and chambers

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bankruptcy judges sit in Indianapolis and the fourth sits in New Albany.

24. Room 344 is currently the courtroom of Judge David F. Hamilton who was appointed to the bench when Judge S. Hugh Dillin assumed senior status in 1994. Following Judge Noland's death in 1992, Judge Steckler moved from the original district judge's suite on the second floor to the senior judge's chambers previously occupied by Judge Noland on the third floor. Chief Judge McKinney moved from Room 344 to Judge Steckler's former courtroom and chambers. On his appointment, Judge Hamilton occupied the courtroom and chambers vacated by Chief Judge McKinney.

were constructed for bankruptcy judges on the third floor. This project included the construction of the newest district courtroom, Room 349, at the northwest corner of the third floor. Planned for visiting judges and future needs, it is currently the Indianapolis courtroom of Judge Richard L. Young who was commissioned to the bench in 1998 on the occasion of Judge Gene E. Brooks' retirement. (Judge Young's home courtroom is in Evansville.) This new construction represents a departure from the plain, utilitarian trend of courtroom design in the Court House and a return toward more sophisticated and crafted decorative elements. Reproducing trim details from the original postmaster's office in the 1936 expansion, the new courtrooms contain deeply-carved mahogany wainscoting, chair rails, ten-panel doors, crown molding, and ceiling coffers. The benches, clerks' stations, and jury and witness boxes were designed in the same manner. Walls behind the benches include thick mahogany trim framing court seals. However slight, these designs and the restoration program represent a shift back to the recognition of architecture and art as valuable contributors to the enhancement of federal governmental facilities. Not simply ornate or expensive ornament, the reproduced classically-solid molding profiles and materials convey the distinctiveness of the judicial arena, framing the courtroom activity in the minds of the occupants with the seriousness and uniqueness of the proceedings.

The 1990s also saw construction of new, modernized offices for the United States Marshal (who still had been in the space occupied since the Court House had opened), new Probation and Pretrial Services offices, new offices for the clerk of the bankruptcy court, and extensively-remodeled offices for the clerk of the district court, all on the first floor. In 2002, the court library moved into new space in the north wing of the fourth floor. Continuing the constant movement of tenants, the United States Trustee moved out to rented space in the early 1990s and the United States Attorney followed suit in 2000.

Although changing little in outward appearance, the United States Court House has undergone a century of remodeling and updating, evolving from primarily a Post Office and headquarters of all federal agencies in the state, including one federal judge, to its role today as chiefly a Court House where five district judges, assisted by five magistrate judges, three bankruptcy judges, and a large administrative staff, dispatch the judicial business of the national government in the southern half of the state. Today, approximately eighty percent of the Court House is occupied by the district court and the United States Marshal.[25] Built with the most modern technologies for its day, including electric lights, elevators, heating plant, and communications, the Court House today continues to incorporate new information and communication technologies while preserving its historic character.

The Court House is a surviving exemplar of a time when public buildings, and especially federal public buildings, were expected to employ the best devices

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25. Non-court-related tenants include the Department of Labor's Bureau of Labor Statistics, Office of Federal Contract Compliance Programs, and Occupational Health and Safety Administration; the Corporation for National Service; and the Internal Revenue Service's Lead Development Center.

of architecture and art to express and instill the values and missions of their occupants. Addison C. Harris, the keynote speaker at the 1903 cornerstone-laying ceremony, described the values that he felt the Court House conveyed:

> The building to rise here is also to be the abode of national justice in Indiana. And it is fitting that justice shall reside in homes as noble in design as the brain of man can conceive, for justice is the supreme power and authority in this republic. Nations express their chief traits in their public works. The Greeks built beautiful temples to their gods, and adorned them with the treasures of art. Rome erected great amphitheaters in which to show the courage of men and beasts in deadly strife, as her chief aim was to extend her power by war and carnage. Modern Europe is full of fortresses, and the waters of the sea are covered with battleships as their means of maintaining the stability of their empires. While in our land the highest aspirations of the people are shown in the noble edifices dedicated to justice. We rule not by force, but by law. Everyone, from the lowest to the highest, guides his course by the stable rules of justice. Right, not might, is the lofty aspiration of our national life.[26]

The Court House continues to effectively symbolize the stability, power, dedication, and protection of the federal justice administered therein. It is as well an elegant expression of our country's devotion to the principle of the rule of law. The Court House is not simply a relic of the past, therefore, but a beautifully-crafted reliquary, housing and displaying the principles of justice and equality for which the republic stands. At 2:30 p.m. on March 25, 2003, one hundred years to the day and hour after our ancestors gathered to lay the cornerstone of the Court House, the court family gathered again to rededicate the cornerstone and the Court House to the mission and the values which they represent and to celebrate the Court House's century of life and the continuing fulfillment of Congressman Overstreet's prediction that "the beauty of the structure will be equal to its utility, and both will be as lasting as time."[27]

On June 23, 2003, President George W. Bush signed Public Law 108-35 which designated the building the Birch Bayh Federal Building and United States Court House in honor of Indiana's former United States Senator. On October 24, 2003, a ceremony was held formally renaming the building and unveiling the new limestone sign that was installed on the lower grass plaza in front of the building.

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26. *Corner Stone Formally Laid*, *supra* note 5.

27. *Id.*

"THREE BANK TELLERS IS ENOUGH" PERSONAL REMINISCENCES OF LEGAL PRACTICE BY MEMBERS OF THE BENCH AND BAR

SUZANNE M. BUCHKO*

INTRODUCTION

War stories of lawyers and judges are legion, and any gathering of members of the bench and bar generate more than a few tales of courtroom exploits and battles nearly won or almost lost. Thus, on October 17, 2003, as part of the Courthouse Centennial Celebration and History Symposium, the Historical Society of the United States District Court for the Southern District of Indiana invited a panel of lawyers and a judge to tell stories about the district court judges before whom they practiced between 1950 and 1995—a time when the number of judges in our district grew from one to five. Attorney James Strain, Chair of the Court Historical Society, moderated the panel discussion entitled *Reflections and Reminiscences on the Practice of Law in the Southern District*, and introduced the event this way:

> Today we have gathered folks who ought to be able to provide some oral history with respect to the judges who sat in the Southern District of Indiana as a group immediately preceding the current crop [of judges]. Starting historically with Judge Steckler, who was appointed by Truman; Judge Holder, appointed by Eisenhower; Judge Dillin[,] appointed by Kennedy; Judge Noland, appointed by LBJ; and then Gene Brooks, . . . appointed by Jimmy Carter.[1]

Participants on the panel included Charles Goodloe, who as an Assistant United States Attorney first appeared before the Southern District Court in 1971; the Honorable Sarah Evans Barker, who, beginning in 1972, appeared before the federal court as an Assistant and as the United States Attorney before assuming the federal bench in 1984; James H. Voyles, who has represented criminal defendants in this district since 1968; John Kautzman, who since the late 1980s has represented both criminal and civil litigants in federal court and is president-elect of the Indianapolis Bar Association for the term beginning in 2005; and William Marsh, who has headed up the Indiana Federal Community Defenders office since 1994 and is an adjunct professor at Indiana University School of Law—Indianapolis. Other judges and attorneys provided additional vignettes through letters.

The transcripts of judicial memorial services and recognition ceremonies found in the Federal Supplement provided background information and

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1. James Strain, Court History Symposium, Luncheon & Panel Discussion: Reflections and Reminiscences on the Practice of Law in the Southern District 3 (Oct. 17, 2003) (transcript on file with author) [hereinafter Symposium Transcript].

additional comments by legal practitioners and colleagues on the bench.

I. THE HONORABLE WILLIAM E. STECKLER

"If a judge can become an institution, Judge Steckler was surely one."[2]

William "Bill" Elwood Steckler was born on October 18, 1913 in Mount Vernon, Indiana, and spent his childhood in the predominately German community of Posey County.[3] His father worked as a machinist and farm implement dealer; neither of his parents were active in politics. Bill Steckler had an uncle, however, who held county office, and young Bill's visits to the county court house, as well as his early acquaintance with a local judge, may have provided inspiration to this bright young man.[4]

Bill Steckler finished high school during the Depression, and although he was offered a scholarship to DePauw University, there was no money to pay his living expenses, and he was forced to pass up the offer.[5] He worked for a year in Mount Vernon, Indiana, and then set out for Benjamin Harrison Law School in Indianapolis, where he could work at Methodist Hospital during the day and attend school at night.[6] Steckler graduated from Benjamin Harrison Law School in 1936 with a Doctorate of Law and in 1937, he earned a Doctor of Jurisprudence from the Indiana Law School in Indianapolis.[7] From 1938 until 1950, he practiced law in Indianapolis at Key & Steckler, with time away to serve in the Navy during World War II.[8]

As an attorney, Bill Steckler organized associations of nursing homes for the purpose of standardizing and monitoring their operations in Indiana and nationwide. He was very active in the Democratic party, serving as chair of the Young Democrats, and he was appointed to the Marion County Election Committee and the State Election Board.[9]

President Harry S. Truman appointed Bill Steckler to the federal bench on April 15, 1950,[10] when he was only thirty-six years old. At the time, Judge Steckler was the youngest person serving on the federal bench. Until 1954, he served as the sole judge in the Southern District of Indiana and was the last judge to do so. Judge Steckler then served as chief judge from 1954 to 1982 and took senior status in 1986, managing an active, if somewhat smaller docket. Judge

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2. Former United States Magistrate Judge John P. Endsley, Comments: Honorable William E. Steckler 1-2 (Fall 2003) (on file with author) [hereinafter Comments: Steckler].

3. Memorial Ceremony for the Honorable William E. Steckler, 917 F. Supp. LXV, LXVI, LXXIII (July 21, 1995) [hereinafter Steckler Memorial].

4. *Id.* at LXXIII.

5. *Id.*

6. *Id.* at LXXIV.

7. *Id.* at LXVI, XCIII.

8. *Id.* at LXVI.

9. *Id.*

10. *Id.*

Steckler died March 8, 1995 following an extended battle with cancer.

At his memorial service, Judge Barker described Judge Steckler as the quintessential judge, noting his capacity for hard work and focus, his sense of fairness, and his clarity of thought.[11] She remembered "his sweetness, his precise style of speaking, his dapper attire, his elegant, wavy black hair, his twinkling eyes and easy smile, and soft words of reply, 'Oh, God love it,' usually said in response to something nice someone had said to him or done for him."[12]

Attorney John F. Kautzman remarked, "[w]hen I think of Judge Steckler I do think about civility and professionalism and the sense of history that he [brought] to the bench and his manner and his demeanor."[13] Former Magistrate Judge J. Patrick Endsley recalled that

> I first met Judge Steckler on the day that he admitted about fifty of us to the bar of the [c]ourt on June 6, 1956. He was a man of quiet competence who was always willing to let an attorney have his say. I appeared before him on a number of occasions representing pauper criminal defendants. He was courteous to all litigants and was a true gentleman.[14]

Magistrate Judge Endsley also remembered a special kindness shown by Judge Steckler after Judge Endsley became a federal magistrate:

> On one occasion I had a jury trial scheduled on a case involving the firing of a number of political appointees after a change of administrations. I [had] been a fan of his courtroom and I told the Judge of my desire to try the case in his courtroom. He graciously consented and made every effort to see that I had one of the finest weeks of my nineteen year judicial career.[15]

Attorney William Marsh recalled that "Judge Steckler was as gentlemanly to [us] radical young lawyers as he was to anybody else."[16] Furthermore, Jim Voyles recalled, "Judge Steckler had a long and distinguished career and always presented himself as a gentleman and someone who was extremely concerned about how lawyers acted in front of him and how they treated their opponents."[17]

Such accolades correspond to Robert Hagemier's eulogy for Judge Steckler at his memorial service:

> Judge Steckler loved lawyers. He loved our work, our lives, our causes

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11. *Id.* at LXXIV.
12. *Id.*
13. Symposium Transcript, *supra* note 1, at 26-27.
14. Comments: Steckler, *supra* note 2, at 1-2.
15. *Id.*
16. Symposium Transcript, *supra* note 1, at 30.
17. Letter from James H. Voyles, Attorney, Voyles, Zahn, Paul, Hogan & Merriman, to A. Scott Chinn, Office of Corporation Counsel, City of Indianapolis 1 (Sept. 29, 2003) (on file with author) [hereinafter Voyles Letter].

> and the pain or elation of "championing them." Many of us must remember our first appearance before him as an advocate. Do you remember how he made you feel? Your case was just, probably more so than even you believed, but so was your opponent's. Venom or mischief, if you harbored it, was best left at that door. All of us were offered a smile, reassurance, the most gentlemanly of manners and customs. If you did not believe in the wisdom and fairness of this court when you entered, you left here with new learning. And if you watched Judge Steckler and remembered his vigilance for the welfare of all who were touched by justice, you left more a lawyer than when you entered.[18]

In addition to his love of the work, Judge Steckler cared deeply for the people who came before him. Judge Endsley remembered: "After my appointment as a [m]agistrate [j]udge he called me one day to tell me that a person that I had represented before him some fifteen years previously had just been killed in an armed robbery. His memory of past cases was phenomenal."[19]

In a recent letter, attorney William F. Welch recounted the Judge's early days on the bench:

> I recall being very favorably impressed with his handling of [his first jury] trial in light of his limited judicial experience at that time. Throughout Judge Steckler's tenure, he developed a reputation among those who practiced in his Court of being considerate of counsel and their clients—sometimes almost to a fault; and of giving each issue presented to him a thorough consideration—again, in the minds of some, almost to a fault. Bill Steckler grew tremendously during his long tenure and developed into, in my judgment, an exceptionally capable and well-qualified jurist. If he struggled with any challenges of his office, that struggle probably related primarily to his perception of the demands and challenges he encountered as the sole [d]istrict [j]udge in the Southern District at the time of his appointment, in comparison to what he considered to be his limited practical experience prior to his appointment to the bench. I always felt he was more concerned with this notion than he needed to be.[20]

Many who remembered the Judge commented on his seemingly endless patience in the courtroom. Attorney William A. Kerr illustrated this quality by remembering the jury trial of *United States v. Aldridge*:[21]

> This was a real estate investment securities fraud case which involved six co-defendants. . . . I prosecuted the case with the assistance of an

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18. Steckler Memorial, *supra* note 3, at LXXXV-VI.

19. Comments: Steckler, *supra* note 2, at 1-2.

20. Letter from William F. Welch, Attorney, Bingham McHale LLP, to A. Scott Chinn, Office of Corporation Council, City of Indianapolis 1-2 (Oct. 2, 2003) (on file with author) [hereinafter Welch Letter].

21. 484 F.2d 655 (7th Cir. 1973).

> attorney from the Securities and Exchange Commission office in Chicago. Seven attorneys appeared for the six co-defendants. The trial began on August 31, 1970, and the verdicts were returned on Sunday, November 22, 1970. This was said to be one of the longest trials, if not the longest trial, in the history of the Southern District of Indiana. I still remember the dignity and patience with which Judge Steckler presided over this trial despite the adverse effect that the trial was having on his otherwise busy schedule of court proceedings and administrative duties.[22]

Jim Voyles recalled the same trial: "It started in August of 1970 . . . [and] I was in that trial until November. . . . [M]y remembrance of Judge Steckler was that . . . his countenance and his patience [were] the same in August as . . . in November. He treated us every day the same."[23] In a similar vein, District Judge John Daniel Tinder, who appeared in federal court as an Assistant United States Attorney from 1974 until 1977, and as the United States Attorney for the Southern District of Indiana from 1984 until 1987 before assuming the federal bench in 1987, remarked at the Judge's memorial that

> Judge Steckler patiently approached each case as though it was the first of that type that he had ever heard . . . . He allowed each side of the case to present their evidence and make arguments. He listened carefully and ruled deliberately. With great patience he tolerated us and the turmoil that we created and the conflict that we presented in each case, and despite the congestion of a busy docket, he approached each case with great care. . . . We always felt that we'd have a chance to make our points and we were certain that they would be addressed. We didn't always win but we knew we'd be heard. His great patience made this courtroom a welcome place to be.[24]

Recently, Judge Barker told those attending the History Symposium:

> I learned from Judge Steckler's patience. Those of you who think it is in short supply, don't blame Judge Steckler for that. He set a high standard. But he was a very patient, kind man who let the process unfold basically at a pace that the lawyers either chose or the proceedings themselves yielded. And I think about his longevity, just his ability to hang in there for so long. And hanging in there for so long [included] a 24-hour period of hanging in there, as well as the . . . duration of his career.[25]

Assistant United States Attorney Goodloe echoed Judge Barker's words, adding

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22. Letter from William A. Kerr, Attorney, to A. Scott Chinn, Office of Corporation Council, City of Indianapolis 2 (Oct. 3, 2003) (on file with author) [hereinafter Kerr Letter].

23. Symposium Transcript, *supra* note 1, at 18.

24. Steckler Memorial, *supra* note 3, at LXXVII.

25. Symposium Transcript, *supra* note 1, at 7.

that "Judge Steckler [was] . . . very patient. And sometimes, in fact, patient well beyond what the lawyers might think would be required for the particular problem that was before him. But he would hear argument right on up until there wasn't any further argument on even sometimes the most minute issue."[26] Marianne McKinney Tobias, a friend of the Judge during the final years of his life, recalled him speaking about patience during one of their conversations, and when she spoke at the Judge's memorial service, she quoted him: "'My clerks get mad at me sometimes, but I really don't care,' he said. 'They get mad at me because I am so slow. But in the end I will make them take time. What they don't know yet is how important it is to doubt.'"[27]

Judge Steckler believed that decorum and civility should be practiced in the courtroom. Attorney Robert Geddes remembered Judge Steckler as

> an exceptional jurist with a kind heart who loved being a federal judge. Court room decorum was extremely important. I remember a local attorney approaching the bench to argue a case with his suit coat unbuttoned. He stated, "Your Honor, I am not sure where to start." Judge Steckler quickly responded, "Young man, you can start by buttoning your coat." At times he was a perfectionist to a fault. There were many times when numerous hours were spent revising instructions for the jury. What a great person.[28]

Attorney Jim Voyles said:

> I learned decorum, I learned professionalism . . . I watched one day, we were standing there, and somebody had walked into the well of the courtroom, and [Judge Steckler] asked them to be removed because they weren't a lawyer. They didn't have permission to be in there because only lawyers could be in there. So you learned things that you carry through the rest of your life these little contacts with these people that became important to you.[29]

At Judge Steckler's memorial, Judge Dillin, having tried a few cases in front of him, remembered that he "was not particularly fond of our southwestern Indiana method of trying cases, which involved a few elbows here and there."[30] Attorney John Kautzman said:

> I remember that afternoon when we had done the final arguments. . . . Jack Ruckelshaus had the nightstick that had been used and wanted to impart to the jury that this was a pretty formidable object, and if the guy

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26. *Id.* at 12.

27. Steckler Memorial, *supra* note 3, at XC.

28. Letter from Robert W. Geddes, Attorney, Hume Smith Geddes Green & Simmons, LLP, to A. Scott Chinn, Office of Corporation Council, City of Indianapolis 1 (Sept. 30, 2003) (on file with author) [hereinafter Geddes Letter].

29. Symposium Transcript, *supra* note 1, at 20.

30. Steckler Memorial, *supra* note 3, at LXXV.

> had been struck the way he said he had been struck he would have been a lot worse hurt. And so at one point Jack purposely dropped—I think it was purposely, I can't say—but he dropped the nightstick on like the evidence table to make enough of a noise to show the mass and the weight of that nightstick. . . . Steckler looked at him like don't you ever do that again.[31]

The Judge took his work very seriously, working long hours and expecting dedication and an excellent work product from all who labored with him. Magistrate Judge Endsley recalled that "[h]e insisted on impeccable legal research, correct sentence structure and accuracy in the work assigned to us as Magistrate Judges. Working with him was always a pleasant experience."[32] Jim Voyles recalled:

> Some of my most interesting instructional conferences I ever had in my life were in that courtroom. We went back in the back and we had this long table and we all sat there and we worked on instructions for maybe two days. And the way it worked, Judge Steckler sat at the end of the table and all the lawyers sat around, and we passed these instructions and we changed words and sentences. And then he would call Miss Murphy, his long time assistant, in, and he would say, "Miss Murphy, would you take care of this?" And the door would seem to close and Miss Murphy would walk back in and hand the instructions to us. They worked like a team. They were very efficient.[33]

Judge Steckler's capacity and love of the work were awe-inspiring. Judge Endsley summed up these qualities when he wrote:

> The spirit of Bill Steckler still reigns in the Southern District of Indiana. His moral integrity, compassion, intelligence, industriousness, and legal knowledge set the highest possible standards for the [c]ourt. He spent more than forty of the hundred years in the Federal Court House and his high standards are reflected in the Judges who reside therein today.[34]

II. THE HONORABLE CALE J. HOLDER

Cale James Holder was born on April 5, 1912, in Lawrenceville, Illinois,[35] and lived most of his life in Indianapolis, Indiana, attending Shortridge High School,[36] Benjamin Harrison Law School, and Indiana University School of Law. He was admitted to the Bar on July 27, 1934, and practiced law in Indianapolis

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31. Symposium Transcript, *supra* note 1, at 27-28.
32. Comments: Steckler, *supra* note 2, at 1-2.
33. Symposium Transcript, *supra* note 1, at 18-19.
34. Comments: Steckler, *supra* note 2, at 1-2.
35. Memorial Service for The Honorable Cale James Holder, 579 F. Supp. LXVIII, LXXI (Oct. 7, 1983) [hereinafter Holder Memorial].
36. *Id.* at LXXXII-LXXXIII.

for twelve years.[37] He served in the Navy during World War II, and afterwards was instrumental in forming the Marion County Republican Veterans of World War II.[38] His political activity after the war catapulted him into leadership positions in his party, and in 1952, Cale Holder chaired the Indiana delegation to the Republican National Convention.[39]

President Dwight D. Eisenhower appointed Cale Holder to the federal bench in 1954, making him the second serving District Judge in the Southern District of Indiana. During his nearly thirty years on the bench, he was the only Republican-appointee on the court.[40] Judge Holder was staunchly conservative and "believed in the tradition that the government should stay off the people's backs as much as possible."[41] He was a strict constructionist of statutes and the Constitution, caring deeply for the legal rights of persons who appeared before him. In the late 1960s, Judge Holder toured Kokomo schools to determine whether the school system practiced segregation and denied African-American students educational opportunities. Finding a pattern of separate and unequal facilities, he ordered the schools be closed, effecting a redistricting plan for the system. In 1975, Judge Holder ordered a "fair" representation of African-Americans on the Indiana State Police force.[42]

After twenty-nine years as a federal district judge, Cale Holder died while still in active service on August 23, 1983, at the age of seventy-one, three days after suffering a stroke.[43] His memorial service was presided over by Chief Judge Dillin with participation by his colleagues, Judges Steckler, Noland, and Brooks.

Reflecting on his experiences practicing before Judge Holder, attorney William F. Welch commented that "Judge Holder's and Judge Steckler's personalities were quite different. . . ."[44] Judge Holder "was older at the time of his appointment to the bench . . . and had practiced law for a number of years, as well as having been active in the Indiana political scene."[45] Generally, Judge Holder was "a 'take charge' jurist, but [he] had a sense of humor and a basic concern, or sympathy, for the practicing bar, which kept the atmosphere in his courtroom on a pleasant and congenial level in most instances."[46] However, not all legal practitioners were so at ease in Judge Holder's courtroom. Magistrate Judge Endsley commented that "Judge Holder always scared the hell out of me. He seemed unnecessarily gruff and short in dealing with those of us who

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37. *Id.* at LXXI.

38. *Id.* at LXXXII.

39. *Id.* at LXXI.

40. *Id.* at CVIII (quoting Diane Frederick, *Colleagues Recall Holder as "Hardworking," "Fair,"* INDIANAPOLIS NEWS, Aug. 24, 1983).

41. *Id.* at CVI.

42. *Id.* (quoting INDIANAPOLIS STAR).

43. *Id.* at LXXI.

44. Welch Letter, *supra* note 20, at 2.

45. *Id.*

46. *Id.*

represented pauper criminal defendants."[47] However, Judge Barker recalled:

> Judge Holder was a very tough, demanding judge, but sort of courtly in his own way. He was always kind to me. I suppose if I expected any gender discrimination it might have been from Judge Holder because he was so conservative and so old guard, you know, but I never got any of that. I got one patronizing sort of remark one time I remember. The Assistant U.S. Attorney Scott Miller, who had been the liaison to the Drug Task Force, had gone out on a search warrant and made himself into a witness foolishly. And so I was a brand new Assistant U.S. Attorney and I picked up the case on the motion to suppress, and I went down there and Scott Miller who is a fine person . . . and a terrific lawyer, . . . was one bad witness. And so we managed through the process and we . . . fended off the suppression efforts, but Judge Holder finished it up by saying, "Mrs. Barker, let this be a lesson to you. Don't ever put on a sidearm and go out there and root and shoot and [execute] search warrant[s] [at] these places with the agents. You stay at the office." It was gratuitous advice. I didn't have any instincts otherwise, but it was very much like Holder.[48]

At Judge Holder's memorial, attorney Carl Chaney of Evansville, Indiana, said of Judge Holder that he "had an extraordinarily deep understanding of his role in the structural scheme of our nation's government. He understood in the broadest and finest senses the role of the judiciary in counterbalance of the two other branches of Government."[49] The Memorial Resolution of the Indianapolis Chapter of the Federal Bar Association noted that he was "not a judicial activist, but an active jurist."[50] Members of the federal bar remembered how "[a]s a trial judge he struck terror in the heart of the unprepared and many a young lawyer shook with fright at the thought of his first encounter. He was firm, fair, and unafraid of facing the tough decisions."[51]

Judge Holder taught a generation of lawyers the legal technicalities of trying a case. Jim Voyles commented that

> [m]y classification of Judge Holder would be a little more earthy than Judge Steckler, and someone who . . . taught you about the technical aspects of being a lawyer. I mean, you could learn the courtesies and professionalism from Judge Steckler, but the technical part of being a lawyer came from Judge Holder for me.[52]

Mr. Voyles recalled that "[i]t was always said about Judge Holder that he taught

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47. Former United States Magistrate Judge John P. Endsley, Comments: Honorable Cale J. Holder 1 (Fall 2003) (on file with author) [hereinafter Comments: Holder].

48. Symposium Transcript, *supra* note 1, at 10.

49. Holder Memorial, *supra* note 35, at LXXXI.

50. *Id.* at C (Memorial Resolution, Indianapolis Chapter, Federal Bar Association).

51. *Id.*

52. Symposium Transcript, *supra* note 1, at 20.

a lawyer to be a lawyer. He did not tolerate mistakes by lawyers. He did not tolerate improper statements by lawyers on his record, and would have no hesitation to publicly remind you."[53] Assistant United States Attorney Goodloe remembered that

> he was very mechanical and very precise. . . . If a lawyer stood up in front of Judge Holder and said, for example, that he was moving the admission of an exhibit, the old judge might lean forward a little bit with a twinkle in his eye and say, "Counsel, are you offering this?" And if the lawyer was really tracking with the judge he would say, "Yes, Judge, I stand corrected. I'm offering exhibit such and such." But if that lawyer wasn't [tracking] and said, "Yes, judge, I move the admissions of—" he would lean back and he might say, "Mr. Oestereich [the court reporter], read to me my question and the lawyer's answer." You see, it is building. And then, if a day or so later that lawyer stood up again and said, "I'm moving the admission of," you might get even more of a response than you want. But one of the things I learned from Judge Holder in doing that was this: [i]f you really were tracking with him and you picked up on that first advisory he gave you, he might go ahead and educate you a little bit by saying, "You understand, counsel, that if I have got a motion in front of me I have got to rule on it. And if it is an offer of an exhibit, that is quite another matter. I don't want the record to show that a motion came before the judge and the judge didn't rule on the motion. I have got to keep my eye on that court of appeals up there." So he was constantly concerned with the record that was being made, and mechanically, to him, it was vastly different to have someone say they were making a motion regarding something than to just simply offer . . . an exhibit in evidence, and he treated them differently.[54]

Mr. Voyles added that

> [b]ut he would also say to us . . . "Now, Mr. Voyles, . . . [y]ou are making tracks on my record. You don't want to . . . or double dribbl[e] on my record." Or he would say to a client on a [security] bond issue, he said, "Now I don't want you to get rabbit fever. . . ." Then he would explain he didn't want this guy to be out running and taking off while he was gone.[55]

Attorney Jim Strain remembered that Judge Holder had specific ideas about what was "good law" in the Southern District of Indiana:

> I was in a case in which a very well-known lawyer in Indianapolis . . . saw fit to put in an affidavit in support of a preliminary injunction, so we saw fit to put him on the stand. And Judge Holder, of course, following

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53. Voyles Letter, *supra* note 17, at 2.

54. Symposium Transcript, *supra* note 1, at 14-15.

55. *Id.* at 22.

> the law, kept him on the stand and said, "You have a choice. You can either withdraw your affidavit or you can leave your affidavit in and go on the stand and be cross-examined." The response to which was, "Well, in New York they do it this way all the time." What do you think Judge Holder's response was to that?[56]

Judge Barker added that she remembered "one time he told me never to cite D.C. Circuit or Ninth Circuit cases in his court, it was not the law."[57]

Attorney Robert W. Geddes remembered Judge Holder as a "stickler for courtroom decorum."[58]

> Any lawyer making a comment in Judge Holder's court better be standing. He also disliked any lawyer using the terms "I think" or "I believe." He had a booming voice. I can remember making my first objection in my first trial in Judge Holder's court. He quickly responded and said, "Sit down." I can still feel my bottom hitting the chair. If you were not prepared in Judge Holder's court, you were in deep trouble. At the same time, he had a soft spot in his heart for certain individuals such as disabled veterans. Like all the federal judges in this district, he was an extremely hard worker and a dedicated federal judge. Some of his greatest skills consisted of conducting tough pre-trial and settlement conferences.[59]

Judge Holder also expected that the lessons he taught be remembered. Again, Mr. Voyles commented:

> The next time you are in Judge Holder's court, you remembered what he told you the first time, because if you didn't remember, you wouldn't be in there very often because it would be very unpleasant. . . . I was co-counsel with a lawyer, and there was a very prominent lawyer . . . on the other side of that case. . . . I remember that he walked up toward the bench, . . . and as he was there talking to the court and us about this exhibit[,] he put his arm on the bench and was kind of leaning on the bench. And I remember Judge Holder looking at him and in a high voice reminded him to take his arm off the bench immediately. Never [during] the rest of the trial did this lawyer get within twenty feet of the bench.[60]

Judge Barker recounted:

> When I was nine months pregnant I had the temerity, after about five hours of a hearing in his court, to lean against the front of the jury box because we had to be standing, but I thought that it would be okay if I leaned against it. He called me out the same way. "On your feet, Mrs.

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56. *Id.* at 11.
57. *Id.*
58. Geddes Letter, *supra* note 28, at 2.
59. *Id.*
60. Symposium Transcript, *supra* note 1, at 20-23.

Barker," he said.[61]

Sometimes Judge Holder's demands for decorum rattled the advocates. Former Judge Endsley recalled:

> I defended an inmate at the [United States Penitentiary], Terre Haute, charged with striking a fellow inmate with a twenty-seven pound wrench. After the [district attorney] had exhibited the instrument to the jury the clerk started to lay the wrench on the exhibit table which had a glass top. The judge jumped up and in a loud voice told his clerk to be careful or he would break the glass. I saw my case going down the drain. The jury was out for four hours after lunch and the Judge was mad because he wanted to return to Indianapolis. I could have pleaded the man guilty and got a four year sentence but he wanted a trial. The judge gave him six years.[62]

Some advocates commented on Judge Holder's fondness for certain litigants. Jim Voyles observed:

> He absolutely revered people who had served in the United States military and had defended their country. . . . And so I can guarantee you any time we had a defendant in front of the court who had a distinguished military career, that information was provided to the court at the first part of the sentencing hearing because he would—the one I remember the most is the Government counsel . . . had presented a memorandum of about a hundred pages about why this person ought to go to jail, and for what reason they had been against the Government, they had done these terrible things, and this fellow had carried his buddies across the beaches at Anzio and had been shot and had Purple Hearts. Well, those are the first five documents that we supplied in our sentencing memorandum. So the Government got done and Judge Holder had him in front of the bench, and he said, "Now, Mr. So-and-so," he said, "I notice you have a remarkably distinguished military career." And my partner, Dennis Zahn [and I], looked at each other and thought things [were] looking up here.[63]

There was general agreement among everyone who shared their insights and stories that Judge Holder was a hard-working judge, some observing that he was as much a "workaholic" as Judge Steckler.[64] When Judge Holder visited the outer division of the Southern District, there were "all-day and far-into-the-night court sessions" conducted by the Judge in order to get through his docket.[65] The Judge was also concerned that his decisions and rulings were sound and not

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61. *Id.* at 21.
62. Comments: Holder, *supra* note 47, at 1.
63. Symposium Transcript, *supra* note 1, at 21-22.
64. Welch Letter, *supra* note 20, at 2.
65. Holder Memorial, *supra* note 35, at LXXXI.

subject to being overturned on appellate review. Jim Strain commented that

> [t]he one thing I learned from Judge Holder was that he worked as hard as any person I have ever seen at trying to get an order out that could not be reversed by the Seventh Circuit. Now, how, you might ask, did he do that? . . . [We] would do kitchen sink orders. Everything conceivable that could be put into the order was put in . . . , so that on some ground—all it takes is one—the order might be affirmed. . . . So when we practiced in front of Judge Holder we put everything we could conceivably put into the order form that we submitted to him in the fond hopes that he would both . . . sign the order and . . . not get reversed.[66]

> Judge Holder was attentive to detail and to efficiency.[67]

> As the dockets in his and Judge Steckler's courts grew . . . , Judge Holder devoted considerable effort to managing his docket; and as part of that effort, he developed a reputation for strong encouragement of, if not outright insistence upon, settlement. One heard from time to time the comment that lawyers who practiced before Judge Holder yearned for the opportunity to try their cases rather than settle them.[68]

Holder believed, however, that "the best lawyers were . . . those who prevented their cases from coming to court in the first place through negotiation and settlement."[69] Attorney Earle A. Kightlinger commented at the Judge's memorial service that

> [h]e was dedicated to fairness and scrupulous in his efforts to reach proper ends under the law. He saved much time in the courtroom by achieving settlements between the parties and amicably disposing of the cases. When asked why he devoted so much of his energy to achieving such settlements, he said that he had concluded after observing from his vantage point the course of litigation usually took that it was just more humane as a solution for all involved.[70]

Judge Steckler added that Judge Holder "had a way of knocking heads together to get cases worked out."[71] Judge Endsley commented that Judge Holder "was a tough pretrial advocate and you always left a conference feeling that you had better compromise the case or suffer the consequences."[72]

Paradoxically, as efficient as he was, Judge Holder did not always appreciate changes within the judiciary that were intended to reduce his burden. Magistrate

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66. Symposium Transcript, *supra* note 1, at 5-6.

67. Holder Memorial, *supra* note 35, at LXXXIII.

68. Welch Letter, *supra* note 20, at 2.

69. Holder Memorial, *supra* note 35, at CIII (quoting *Remembering Cale J. Holder*, INDIANAPOLIS NEWS, Sept. 12, 1983).

70. *Id.* at LXXXIII.

71. *Id.* at CVIII (quoting Frederick, *supra* note 40).

72. Comments: Holder, *supra* note 47, at 1.

Judge Endsley was left with the opinion that Judge Holder did not appreciate the value of the magistrate judge position, saying:

> As a Magistrate Judge the Judge tried his best to ignore us. I did his pre-trials in the outer divisions from 1979 until his death. I was required to hold a conference on all cases on the docket regardless of their current status. He never conferred with me on any case regarding any issue and never commented on the reports. I concluded that he just didn't care for the magistrate system and was going to use it as little as possible.[73]

Judge Holder's conservative philosophy was well known, as was his penchant for tough sentences. These predilections occasionally gave rise to the amusing incident. Judge Barker remembered: "One sleepy morning, his sleepy law clerk, who was serving as bailiff, came in and gaveled the Judge in and said: 'The Honorable Cale Jail Holder presiding.' A lot of requests for continuances came next."[74]

Outside of the courtroom, Judge Holder was gregarious and devoted to his family, which included three cherished grandsons.[75] He was an avid sportsman and enjoyed his friends and neighbors. Judge Barker offered a particularly revealing comment when she said that

> with each of the Barker babies who were born [while I was an Assistant United States Attorney], . . . in the most discrete, you might almost think conspiratorial way, he had [delivered] to me through intermediaries two nice gift bottles, one for each occasion, of Harvey's Bristol Cream Sherry. And he wouldn't write anything to say that it was from Judge Holder, but he sent word with the go-betweens, ["]I think you will be needing this in the middle of the night.["][76]

III. THE HONORABLE S. HUGH DILLIN

Samuel Hugh Dillin was born in Petersburg, Indiana, on June 9, 1914. His father, Samuel E. Dillin, was a prominent trial attorney in Petersburg, Indiana, and his mother, Maude, was a pianist/organist, music teacher and graduate of the Cincinnati College of Music. Early on, young Hugh was exposed to the legal world when Samuel E. Dillin started taking his ten-year-old son to court trials. Hugh Dillin became acquainted with Pike Circuit Court Judge John F. Dillon, who was his relative, and Indiana Supreme Court Justice Walter E. Treanor, who was later appointed to the Court of Appeals for the Seventh Circuit, and was a frequent dinner guest at the Dillin home.[77]

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73. *Id.*

74. Symposium Transcript, *supra* note 1, at 25 (emphasis added).

75. Welch Letter, *supra* note 20, at 2.

76. Symposium Transcript, *supra* note 1, at 10-11.

77. Recognition Dinner honoring The Honorable S. Hugh Dillin, 606 F. Supp. LXV, LXXI (Oct. 10, 1984) [hereinafter Dillin Recognition].

Hugh Dillin followed the family tradition by attending Indiana University where he was a member of the debate team and the marching band. He was also president of Delta Tau Delta fraternity, editor of a humor magazine, and an exceptional bridge player. He received his A.B. degree in government in 1936 and his law degree in 1938.[78]

After law school, Hugh Dillin joined his father's law practice, where he remained until 1961 when he was appointed to the federal bench. Although the practice was a general one, he developed expertise in mineral law and litigation.[79]

At the age of twenty-two while still attending I.U., Hugh Dillin was nominated to serve in the Indiana House of Representatives as the representative from Knox and Pike Counties. During his first term, a bill was introduced to abolish the bar examination. The bill had already passed the Senate and was expected to pass in the House. Representative Dillin rose to announce that he would vote against the bill because, given the importance of assuring that qualified lawyers practice law in Indiana, the bill's passage was not in the public's interest. He was twice re-elected, serving in the House until he resigned to volunteer for the Army during World War II.[80]

After serving as a legal officer in the Ordnance Department of the Army, Hugh Dillin returned to civilian life and worked as legislative advisor to Governor Henry F. Schricker. In 1951, Hugh Dillin was re-elected to the House where he became minority leader. In 1956, he launched an unsuccessful bid for the Democratic nomination for Governor, and in 1958 was elected to the State Senate. During the 1961 senate session, Dillin held two influential posts—majority floor leader and President *Pro Tem*. He became well-known as a floor leader who furthered the goals of his party by providing other legislators the opportunity to present and advance legislation while reserving his forensic skills and quick wit for rebuttal arguments.[81]

On October 7, 1961, President John F. Kennedy appointed S. Hugh Dillin to the federal bench.[82] Throughout his judicial career, Judge Dillin distinguished himself as an exceptional trial judge and a wise decision-maker. His tenure was marked by especially difficult and controversial cases, including the desegregation of the Indianapolis schools, the conditions and medical care at the Marion County Jail, the invalidation of the patent on liquid corn oil, and the hundreds of claims that arose out of the 1963 explosion at the State Fairground's Coliseum which injured and killed spectators at a *Holiday on Ice* show.[83]

Judge Dillin became the first president of the District Judges Association of the Seventh Judicial Circuit. The judges within the Circuit elected him to serve as the Circuit's judge representative on the Judicial Conference of the United States, the legislative and policy-making body for the federal judiciary. While

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78. *Id.* at LXXII.
79. *Id.*
80. *Id.* at LXXIII.
81. *Id.* at LXXIV.
82. *Id.* at LXXI.
83. *Id.* at LXXV.

serving on the Judicial Conference, he participated as a member of its Executive Committee and its Court Administration Committee. Sometime later, he was appointed to the Judicial Panel on Multidistrict Litigation.[84] Judge Dillin served as chief judge of the Southern District from July 1, 1982 until June 9, 1984,[85] and he took senior status in 1985.

An *Indianapolis News* article, reporting on Judge Dillin's recognition dinner, a reporter wrote:

> During the pendency of the [Marion County school desegregation case], Dillin was often reviled, threatened and criticized. He responded, however, with patience, common sense, humor, and a sympathetic understanding that most of the controversy stemmed from a natural concern on the part of parents for the welfare of their children.[86]

This assessment incorporates many attributes and perceptions that members of the bench and bar have had regarding Judge Dillin's work. During the Symposium, Assistant United States Attorney Charles Goodloe said:

> Judge Dillin was . . . a keen wit to me, . . . one who could get to the very core of a matter quickly. And when he had heard enough basically he would tell you he had heard enough, and then he could give you a ruling. And many times that oral ruling would sound like it [was] something that he had been working on for several days, described by one of our colleagues one time as like peeling a banana. He could . . . layer it out for you, what the rationale was for the decision. And that [was] something, if you [were] paying attention to [what was] being done there, you [could] learn from [it].[87]

Judge Barker added:

> From Judge Dillin I learned how to get to the heart of the matter. One of his most famous expressions was, "Can't you summarize it?" . . . [W]hatever was said before him, "Mrs. Barker, summarize it." So you had to be able to go quickly to the holding, or the issue, or why you were putting a witness on, that sort of thing.[88]

At times, the Judge's habit of getting to the heart of the matter quickly challenged practicing attorneys. Judge Barker recollected: "Some of you may remember his rule on bank robberies. Three bank tellers are enough. And we used to worry about the empty chair. You know, what is the jury going to say about where were the other two? Three tellers are enough."[89] In a similar vein, Assistant United States Attorney Charles Goodloe interjected:

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84. *Id.*
85. *Id.* at LXXI.
86. *Id.* at CXI-CXII (quoting *Judge S. Hugh Dillin*, INDIANAPOLIS NEWS, Oct. 10, 1984).
87. Symposium Transcript, *supra* note 1, at 12-13.
88. *Id.* at 7-8.
89. *Id.* at 8.

> Many years ago I was trying [a bank robber] in front of Judge Dillin and it was going to take about five days and he thought it should take maybe about half that. So he made me line up the witnesses out in the corridor leading into the courtroom so that when one came out that was a signal for the next one to come in, and I did it that way, right on through the end of the trial. . . . [T]hat was one . . . personal attribute that he couldn't really shake. Once he had heard enough of a particular thing he was ready to move on, and you had to pick up on that and be prepared to move on.[90]

Judge Barker also noted Judge Dillin's efficiency during trial:

> He could keep his eye on the ball and move [things] through. I had one death case from Terre Haute where a prisoner had killed another one, and I left home telling Ken and the kids, "I'll see you in a week, maybe, a little longer, although I'll be home for the weekend." And I was home by Tuesday night after the case had started on Monday, verdict and all.[91]

And John Kautzman remembered:

> I do remember him being somewhat impatient, though, and being very interested in efficiency. And if he didn't like something about the way things were going in the courtroom, it didn't matter if it was the plaintiff's lawyer or the defense lawyer, he would immediately take over the questioning from the bench.[92]

Magistrate Judge Endsley remembered how Judge Dillin could push a lawyer to prepare for trial.

> He was known for his off-hand remarks from the bench and often encouraged attorneys to "get on with it." He could be gruff and condescending from the bench. He was efficient and pushed litigants to the limit. He demanded preparation and maximum use of trial rules to expedite the presentation of evidence. He was a natural judge, learned in the law, skilled in his knowledge of people and a master in the courtroom.[93]

Jim Voyles also remembered:

> I again had the distinct honor and privilege of trying cases in front of Judge Dillin, who made short work of people who made silly statements and were not prepared to try their cases. . . . He was an extremely bright and talented lawyer and exhibited his talents in the law while serving on

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90. *Id.* at 13-14.

91. *Id.* at 7-8.

92. *Id.* at 29.

93. United States Magistrate Judge John P. Endsley, Comments: Honorable S. Hugh Dillin 1-3 (Fall 2003) (on file with author) [hereinafter Comments: Dillin] (emphasis omitted).

the [D]istrict [C]ourt bench.[94]

Judge Barker reiterated that "he was a very practical, efficient, and very, very smart judge. I hope I learned several things from him."[95]

Of Judge Dillin's life before he took the bench, Magistrate Judge Endsley wrote:

> I have known Hugh Dillin since early 1956 when he enlisted a group of young Democratic lawyers to assist him in his campaign for the gubernatorial nomination. Although his efforts were unsuccessful the group formed lifelong friendships with him and our good relationship exists till this day.
>
> During his senatorial days in the State House (1960) I had the opportunity [to] see him carry the governor's program to major success. . . . We all worked to obtain support for his nomination to the District Court in 1961. He probably didn't need it as he had the late Senator Hartke and Governor Welsh in his corner.[96]

Magistrate Judge Endsley also recalled that Judge Dillin's "sense of humor was legendary and he was often the roaster."[97] Judge Endsley further observed that "Judge Dillin was a brave and conscientious man. During the height of the school desegregation case he never took his name out of the phone directory."[98] According to Endsley:

> Hugh Dillin was the best judge that I have ever known. He was intelligent, a good listener, wise in the ways of the world, and did not easily suffer fools. I tried a number of [Criminal Justice Act] cases before him both with and without a jury. Draft evaders (avoiders) were very interesting. All of the Judges were veterans of WWII and had little sympathy for these whose sole reason for avoidance was the immorality of the conflict. However, as the sixties moved into the seventies Judge Dillin also seemed to change.
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> In the late sixties I represented a young man whose religious convictions would only allow him to sit on a sheepskin. He could not and would not sit on a chair unless his skin was under his butt. The U.S. Marshal had seized his skin and when court convened my client remained standing. Judge Dillin inquired in his usual affable manner as to the problem. Upon being informed he recessed the [c]ourt instructing the Marshal to get the man his sheepskin. As he went through the door to his chambers I would swear we heard him laugh. My client spent the

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94. Voyles Letter, *supra* note 17, at 2.
95. Symposium Transcript, *supra* note 1, at 7-8.
96. Comments: Dillin, *supra* note 93, at 1-3.
97. *Id.* at 3.
98. *Id.* at 2.

next two years at Wishard [Hospital].

> About three years later I represented a young man who waited out the war in Australia, England and India. He couldn't find God in any of those places so he showed up at the American Embassy in England and got passage home. The Marshal met him in Bangor[,] Maine and escorted him to Indianapolis. He was tried before Judge Dillin. The war had been over for a couple of years. During the trial we established that the local draft board had failed to follow their regulations on calling up persons who were overseas. The Judge acquitted him. He was a man of compassion.[99]

Judge Endsley added: "As to possible predisposition, I believe he tended to support the applicant in Social Security Disability reviews and gave plaintiffs wide latitude in presenting discrimination evidence in civil right cases. However, his rulings in such cases were always supported by the law."[100]

Just being with Judge Dillin could be an awe-inspiring experience. John Kautzman recalled the first time he was invited into Judge Dillin's chambers.

> And you are back there and you see pictures of him and President Kennedy on the wall, and it is just an amazing feeling of understanding what a small cog we were in this tremendous wheel of justice going all the way from Indianapolis to Washington, D.C., and it was a tremendous experience.[101]

Magistrate Judge Endsley again captured the significance of Judge Dillin's tenure on the court:

> The long-term impact of S. Hugh Dillin has to be reflected in the numerous law clerks, interns and young lawyers who were exposed to one of the most intelligent of judicial officers. He held to the high standards established by Judge Steckler. His contributions to our community are many. I attended a retirement dinner for one of our local civic leaders. Many dignitaries were introduced. When the Judge's turn came he received the loudest applause and a standing ovation and it wasn't his dinner.[102]

Attorney William Welsh summarized his memories of Judge Dillin this way:

> Judge Dillin had the benefit of extensive law practice and legislative experience prior to being appointed, and his intellectual capacity served at times to make him appear to be a tough taskmaster in the courtroom. My impression, based upon admittedly limited experience in his court, was that he was basically fair and considerate of all counsel and their

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99. *Id.* at 1-2.
100. *Id.* at 2.
101. Symposium Transcript, *supra* note 1, at 28.
102. Comments: Dillin, *supra* note 93, at 3.

> clients appearing before him, but could demonstrate something of a "short fuse" if someone tended to "push the envelope[.]" In other words, in the vernacular, he did not suffer fools gladly. The case most widely associated with Judge Dillin in the public's mind undoubtedly was the busing case involving the public schools in Indianapolis and Marion County. The issues presented were "hot button" ones, both locally and nationally, at the time; and the media gave the case priority coverage during its lengthy pendency. Few people were neutral regarding mandatory school busing in those days, and Judge Dillin's decisions directing its adoption and enforcement made him a hero to its adherents and something less than that to its opponents. This was a classic example of the type of case which can test the resiliency and integrity of a judge and give him or her the feeling of being the loneliest person in the world.[103]

IV. THE HONORABLE JAMES E. NOLAND

"This Judge . . . truly had a judicial temperament. This is a gift of the almighty, not of mere man."[104]

James Noland was born into a large Democratic family in LaGrange, Missouri, on April 22, 1920.[105] Politics was a family pursuit, and young James joined the fray when, at age eight, his father brought him to Cape Girardeau, Missouri, to help his uncle campaign for sheriff. Much later, while James Noland was serving in the military, his father ran for Congress against the man whom James Noland would eventually defeat in his own bid for a Congressional seat.[106]

The Noland Family moved from Missouri to Roachdale, Indiana, in 1923 and then to Bloomington during James's freshman year in high school. After high school, James Noland did undergraduate work at Indiana University and received a master's degree in business administration from the Harvard Graduate Business School. After serving in the Army Transportation Corps during World War II,[107] he completed a law degree at Indiana University School of Law at Bloomington.[108]

While still in law school, James Noland made a successful bid for the United States House of Representatives and served from 1949 to 1950 as one of the

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103. Welch Letter, *supra* note 20, at 2-3.

104. United States Magistrate Judge John P. Endsley, Comments: Honorable James E. Noland 1-3 (Fall 2003) (on file with author) [hereinafter Comments: Noland].

105. Memorial Service for The Honorable James E. Noland, 816 F. Supp. LXI, LXXXIII (Dec. 11, 1992) [hereinafter Noland Memorial]; *see* Welch Letter, *supra* note 20; *see also id.* at 1-2.

106. Noland Memorial, *supra* note 105, at LXXXIV.

107. Recognition Dinner honoring The Honorable James E. Noland, 678 F. Supp. LXIX, LXXVIII (Mar. 27, 1987) [hereinafter Noland Recognition].

108. *Id.* at LXXV.

youngest members of Congress. When his congressional term ended, Noland moved to Indianapolis to practice law, taking a position as Deputy Attorney General advising the State Board of Tax Commissioners and the Legislative Reference Bureau. A few years later, he became the First Assistant City Attorney and served as counsel for the Board of Public Works and Off-Street Parking Commission. James Noland was also engaged in private practice during this time and appeared often in federal court.[109]

In 1966, following an appointment as Special Master in the Southern District to oversee hearings on land condemnation proceedings involving the federal government's taking of land for the Monroe Reservoir,[110] President Lyndon B. Johnson appointed James Noland to the federal bench to fill a newly-authorized judgeship.[111]

Once settled on the bench, Judge Noland accepted additional responsibilities. From 1972 until 1982, he was a member of a special committee of the Judicial Conferences dealing with the operation of the magistrate judge system. Judge Noland also served as chair of the National Conference of Federal Trial Judges of the American Bar Association, chair of the American Bar Association's Judicial Administration Division, and president of the District Judges Association of the Seventh Federal Circuit.[112] In 1983, Chief Justice Warren E. Burger appointed Judge Noland to a seven-year term on the United States Foreign Intelligence Surveillance Court, which reviewed executive-branch applications for electronic surveillance of foreign powers and their agents. Chief Justice William Rehnquist elevated him to Chief Judge of that court in 1988.[113] Judge Noland served as Chief Judge of the Southern District from 1984 until 1987, at which point he took senior status and continued taking cases on a limited rotation.[114]

Judge Noland served on the district court for twenty-five years, until his death on August 12, 1992, at the age of seventy-two after a brief respiratory illness.[115]

During his tenure, Judge Noland proved himself entirely capable of managing the many "tough cases" which came to his docket. Examples abound, but commentators at his recognition dinner and memorial service highlighted the 1975 criminal trial of twelve Black Muslim inmates at the Federal Penitentiary at Terre Haute who were charged with the brutal knifing murder of an inmate who was the leader of the African Cultural Society,[116] a landmark

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109. *Id.*
110. *Id.*
111. *Id.* at LXXVI.
112. *Id.*
113. *Id.* at LXXVII.
114. Noland Recognition, *supra* note 107, at LXXVI.
115. Noland Memorial, *supra* note 105, at LXIII & C.
116. Noland Recognition, *supra* note 107, at LXXIX.

reapportionment case,[117] the 1985 Ryan White case,[118] the first trial of Speedway bomber Brett Kimberlin[119] and the Cypriot mosaics case in which he ruled that countries have a right to regain their cultural heritage.[120]

Judge Noland's contributions were memorialized in a resolution noting his exemplary character and career: "James E. Noland epitomized the qualities of integrity, dignity, tolerance, and warmth such that he was a living example of the civility that should exist throughout our justice system."[121] The Indianapolis Bar Association resolution stated:

> His loyalty and devotion to the cause of justice is legend, as, indeed, was he a legend in his own time in our profession. Our profession had no better jurist. He loved people and was loved and respected by people from all walks of life. There was never anyone too great or too small to receive his attention, time and concern.[122]

Professor William Harvey's eloquence captured the Judge's special qualities, observing that his "combinations of power and grace, of intellectual strength and personal kindness, of firm commitment and wise flexibility, were in harmonious balance."[123]

Attorney Robert Geddes described Judge Noland as

> an individual who was very down to earth. He did have an imaginary line in his court room and if you were arguing a case before the jury, you'd better not pass that line. He had candles in his conference room and sometimes I thought I was in a funeral home. He was a wonderful, conscientious judge who did his best to solve all legal disputes in a professional manner. He had excellent skills in resolving cases before mediation came into existence.[124]

In the courtroom, Judge Noland's kindness and caring to lawyers and litigants were legend. Attorney Virgina Dill McCarty said that "no lawyer needed to fear coming to [his] courtroom. It was always a pleasure."[125] Attorney and former law clerk Richard Darko recounted that

> He got along with lawyers; he got along with litigants . . . . He went out of his way not to embarrass anyone in the courtroom. He really set the standard for the lawyers in the Southern District of Indiana as to how you should act in the courtroom. He always expected people to be civil,

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117. *Id.* at LXXX.
118. *Id.* at LXXXI.
119. *Id.* at CVII.
120. Noland Memorial, *supra* note 105, at CII.
121. *Id.* at LXXI.
122. *Id.* at LXXII.
123. *Id.* at LXXVI.
124. Geddes Letter, *supra* note 28, at 2.
125. Noland Memorial, *supra* note 105, at LXXX.

to be polite.[126]

Assistant United States Attorney Charles Goodloe agreed, remembering:

> I consider[ed] him very, very courtly, very gentlemanly, and the things I learned from him were much like Judge Steckler. He was very patient and generally, I think, the lawyers were basically very comfortable and at ease before him. And even if you made a mistake you wouldn't feel like there was going to be something that would come back to embarrass you in a big way. He was very nice about that. He might suggest a thing, or two. Well, maybe you should do such and such. That was not to say . . . that he didn't also provide some education and advice, much like the others, but he was far less . . . imposing.[127]

Judge Dillin quipped that "[h]e always gave everyone a chance to say their piece,"[128] and Magistrate Judge Endsley recalled that the Judge was

> always, calm, cool and collected on and off the bench. He had a fine sense of humor and loved to swap stories. He never had a bad word to say about anyone, a trait he shared with both Bill Steckler and Hugh Dillin.
>
> I represented several indigent criminal defendants in front of Judge Noland and always found him fair and reasonable. I can only recall one occasion when he became upset with a recalcitrant witness and actually raised his voice.[129]

Judge Noland's graciousness enhanced his effectiveness as a judge. At the memorial, attorney Virginia Dill McCarty said that "[d]espite his unfailing courtesy, he did move cases. In fact, I used to describe him as having an iron hand in a velvet glove. Maybe even two velvet gloves for his courtesy."[130] Indiana's then-Governor Evan Bayh, who began his legal career as a law clerk to Judge Noland, remembered:

> I still remember to this day an occurrence that happened in one particularly vexing case that we were trying very hard to settle to do justice, and to move the calendar along. And after several hours of negotiation finally the Judge looked at the plaintiff's counsel after an offer had been made by the defense and he looked him straight in the eye and he said, "Mr. Smith," he said, "you are aware of the provisions in the Southern District of Indiana for remitter, are you not?" And the plaintiff's lawyer swallowed hard and he said, "Yes, Your Honor, I am." And the Judge said, "Well, in that spirit I ask you if you wouldn't talk to

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126. *Id.* at CI.

127. Symposium Transcript, *supra* note 1, at 16.

128. Noland Memorial, *supra* note 105, at CI.

129. Comments: Noland, *supra* note 104, at 1.

130. Noland Memorial, *supra* note 105, at LXXX.

> your client one more time." I believe the case was settled within the hour.[131]

Jim Voyles recalled early criminal trials in which he represented defendants before Judge Noland:

> He would say, "Now, Mr. Voyles, you know, the train is getting ready to take off from the station. Is your guy going to get on the train?" Took awhile to have him explain that to me. But he wanted to know was if there was going to be a guilty plea. . . . He brought us in chambers and he said, "You know, Mr. Voyles, the train is leaving the station today. Is he going to get on the train?" And I said, "No, Your Honor, unfortunately, he is going to miss the train." And he said, "All right, . . . I just want you to know that after the train leaves the station it doesn't return." And I said, "Judge, I understand."[132]

Mr. Voyles also recounted details of a particular case and the Judge's manner:

> He had a wonderful reputation of being a great sense of humor and one of my most memorable cases tried in front of him was the case of the "exploding dildo." A client had been accused of sending the object through the mail where it had exploded and was treated by the postal authorities and the Federal Bureau of Investigation and the United States Attorney's office as a criminal violation of sending a bomb through the mail. Fortunately, after a considerable length of time the jury found my client not guilty, but I certainly enjoyed the opportunity to have appeared in front of Judge Noland and the wonderful side-bar remarks that he would make about not only the events that were occurring at the trial, but the conduct of the lawyers. Another memorable case that was tried in front of Judge Noland was the case of Porky's Family Video, which was a video store that had a large pig outside of it, where the owner of the store thought it was easy to sell video tapes because he just taped them at home at night, violating all the copyright laws.[133]

Judge Barker also recalled Judge Noland's sense of humor:

> When something [funny] would happen . . . in court he couldn't contain himself. And so for those of us who were regular practitioners up there we learned to recognize the signal when he would put his hand over his mouth so people wouldn't see he was laughing. But he was up there laughing and, of course, his eyes gave it away. He was completely charmed by whatever was happening, or at least caught the humor of it.[134]

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131. *Id.* at LXXIV.

132. Symposium Transcript, *supra* note 1, at 23-24.

133. Voyles Letter, *supra* note 17, at 2.

134. Symposium Transcript, *supra* note 1, at 8.

The Judge's sense of propriety and court room etiquette influenced his expectations for his law clerks. Judge Barker remembered:

> [A]ll of [his law clerks] . . . had to wear white shirts and dark suits to . . . work. So even though blue shirts were coming into vogue—oh no, not in Judge Noland's chambers. And there was one [young law clerk] who came in with a long pigtail sort of thing, that was apparently okay in law school, but when he showed up with that Judge Noland noticed it right away and sent him that day, that moment, across the street to get a haircut. And no pierced ears, nothing like that with Judge Noland.[135]

Judge Noland's chambers were decorated in a unique style, one that attorneys and other visitors vividly remember. Professor William Harvey included this memory in his remarks at Judge Noland's memorial service:

> When we enter [the conference room] we feel a presence. Something is here which is more than a room for judicial discussions, decisions, schedules or settlements. The paintings he placed there introduce the sensations which are present. On these walls we see a copy of Washington and his Generals. Another painting is Washington entering New York. In this scene, the crowd shows adoration because they know that whatever life might bring to each person, the Republic is saved. On the opposite wall there are paintings of Lord Nelson's ship Victoria, which he sailed into Trafalgar. The comparison between Lord Nelson's ship and Washington entering New York forever reminds us of the utter hopelessness of the American cause, then or now, unless it lives with the Spirit of Liberty in dedicated persons. There are scenes of the restoration at Colonial Williamsburg. We observe a soft green table cloth, brass candle sticks and a double-armed candlestand. They compose the motif of colonial Williamsburg and its central theme and meaning.[136]

At the Symposium, Judge Barker recalled:

> I do remember a funny little aside. You know, the judges worked together and knew each other for a long time, so they would tease each other and, obviously, behind each other's backs make little remarks. But I remember one time there was going to be a judges meeting up in Noland's chambers, and he had this elegant chambers. . . . Judge Noland's conference room had this long table, with chandeliers and it had on the desk a quill pen and there were candelabra[s]. Tasteful, you know. But I remember . . . talking to Judge Dillin about something and he [said], "Well, I must go now to the Williamsburg suite." Judge Noland loved to live like it was colonial Williamsburg.[137]

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135. *Id.* at 9.

136. Noland Memorial, *supra* note 105, at LXXVIII.

137. Symposium Transcript, *supra* note 1, at 9-10.

Jim Voyles shared a similar memory:

> Judge Noland [had]. . . a very courtly and interesting chambers where you would go in and kind of enjoy yourself. As I remember it, there was a fireplace. I mean, it was really—and Williamsburgsy is the kind of thing that Judge Dillin would say about him. But he had a sense of humor. I tried a case in that courtroom [concerning an exploding sexual object sent through the mail]. . . . [W]e tried the case with the postal inspectors, and it was a big case because it was a very dangerous situation. But throughout the trial Judge Noland—we would have these periodic little breaks because of the humor that were in the case, and we would see Judge Noland would be covering his mouth, or he would call us to the bench.[138]

Judge Noland's kindness extended in special ways to those of his friends and acquaintances who benefitted from his mentorship. Magistrate Judge Endsley recalled:

> In the late seventies, when I was serving as Judge of the Marion Circuit Court, I chanced upon him on the Circle at lunchtime. He advised me that Congress had authorized a third Magistrate Judgeship for the [Southern District] and if I was interested he would present my name to the Judges. As the only Democrat elected to the Circuit Court since 1938 I didn't expect to make a career there; so I said I would consider it.
>
> About two months later he called me and offered me the appointment. After consulting with my wife and other advisors I advised him that I would accept the appointment. As a result I spent nineteen years on the bench instead of six. From my point of view the Judge had outstanding ability to recognize merit when he saw it.[139]

V. THE HONORABLE GENE E. BROOKS

Gene Brooks was born in Griffin, Indiana in 1931. He graduated from Griffin High School, Indiana State University, and after serving in the Marine Corps, from Indiana University, Bloomington, where he received his law degree.[140]

He ran for prosecutor in Posey County, Indiana, in 1958, and held that office for ten years. In 1968, Gene Brooks was appointed Bankruptcy Referee for the Southern District of Indiana, which provided him with a later opportunity to become president of the National Conference of Bankruptcy Judges. Judge Brooks' leadership was instrumental in crafting the reforms which culminated in

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138. *Id.* at 23-24.

139. Comments: Noland, *supra* note 104, at 1.

140. Recognition Ceremony honoring Honorable Gene E. Brooks, 732 F. Supp. LXXV (Apr. 22, 1988) [hereinafter Brooks Recognition].

the passage of the Bankruptcy Act of 1978.[141]

In 1979, President Jimmy Carter nominated Judge Brooks to fill the newly authorized fifth District Judgeship in Southern Indiana. His post of duty was in the Evansville Division which made him the first district judge to permanently reside there. Judge Brooks' term spanned seventeen years, from 1979 until 1996, when he retired and returned to private practice. Judge Brooks also served as Chief Judge of the District between 1987 and 1994.[142]

Judge Brooks' service was centered in the Evansville division and because the panel assembled for the Symposium and the letters provided by practitioners represented the legal community practicing primarily in Indianapolis, there were fewer anecdotes relating to him. Also, because Judge Brooks is still living, an extensive written record of his tenure has not yet been compiled.[143]

Magistrate Judge Endsley recalled:

> I have known Judge Brooks since the early sixties. At the time I was appointed a Magistrate Judge[,] his Honor was a Bankruptcy Judge. In 1979, both he and I were on the final list forwarded to Senator Birch Bayh of approved candidates for the new fifth judgeship. Most of us knew that Gene or Senator Fair would get the appointment . . . .
>
> For the next several years, I handled pretrials in the Evansville and Terre Haute divisions and saw him on a number of occasions both in the court and socially. He was always friendly, humorous and efficient. I observed him in several trials and felt that he had a good judicial presence and demeanor. He allowed litigants and their attorneys to have their "Day in Court."
>
> The judge was always appreciative of . . . [the Magistrates'] efforts in his behalf. I have attributed this to the fact that he had served for over a decade as a Bankruptcy Judge and knew and understood the problems of a second banana.[144]

At Judge Brooks' recognition ceremony in 1988, attorney Theodore Lockyear of Evansville noted:

> What makes Judge Brooks a good judge? I have always thought it's because he has a wide range of interests; not only his sports, . . . [h]e is a prolific reader. He is a traveler, loves to tell a story, loves to be around people, a great heart[s] player. . . . [H]e is [also] a teacher. And I think I

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141. *Id.*

142. Federal Judicial Center, History of the Federal Judiciary, Judges of the United States Courts, Brooks, Gene Edward, *at* http://www.fjc.gov/newweb/jnetweb.nsf/fjc_history?OpenFrame Set; *see also supra* note 140, at LXXV.

143. *See* Welch Letter, *supra* note 20.

144. Former United States Magistrate Judge John P. Endsley, Comments: Honorable Gene E. Brooks 1 (Fall 2003) (on file with author).

> have always thought if he had not been a judge, he would have been a teacher or great coach. He loves to pass on those things that he has learned through the toil of the courtroom as a trial lawyer, as a prosecutor, as a bankruptcy judge, and now as a district court judge. . . . When you walk into his courtroom, there is a certain magnetism there. The jurors are happy. They like him because he treats them fairly. He relaxes them. He has concern for their interests and their well-being. . . . But he won't allow bitter, personal attacks between counsel to take place. He keeps a firm control of the situation. He tries and works hard at keeping the lawyers directed toward the facts within the law as he lays it down.[145]

Another speaker at Judge Brooks' recognition ceremony, attorney Sydney Berger, added the following note about Judge Brooks' practice of allowing each litigant his/her time in court:

> [Judge Brooks] is the only district judge that I know of—and I did some research—in the entire country who has held hearings in social security cases, for only 10 or 15 minutes. But he did that because he believed that people ought to be able to see the person who will make the decision. The law didn't require that. It's an appeal on the record.[146]

Attorney Jim Voyles recalled that Judges Brooks was

> a judge who I appeared in front of while he was sitting in Evansville, Indiana. The best part of the trips to Evansville were the opportunity to go into chambers and hear Judge Brooks' wonderful stories in reminiscing about his life on the bench and the practice of law.[147]

Assistant United States Attorney Goodloe remembered that:

> In the District Court he was philosophical, witty, and liked to tell humorous stories. But sometimes when he was doing that he could mislead you. You might be sitting there laughing and lose track of what is going on, and that could be a mistake because he was usually keeping track of the process.[148]

Judge Brooks' story-telling skills were commented upon by almost everyone who has appeared before him. Again, Jim Voyles commented:

> [H]e enjoyed telling stories and being with the bar probably as much as any lawyer or judge I have ever known, and that was all part of it. So you know if you go to Evansville you are going to spend the first half of the day listening to stories and having a good time in chambers, and then

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145. Brooks Recognition, *supra* note 140, at LXXXVII-LXXXVIII.

146. *Id.* at XC.

147. Voyles Letter, *supra* note 17, at 2.

148. Symposium Transcript, *supra* note 1, at 16-17.

when you came out the business was serious.[149]

CONCLUSION

Attorney William Welsh, a lawyer whose own distinguished career has been co-extensive with all the judges whose tenures have been highlighted in this article, provided this retrospective assessment while writing about all the judges of the United States District Court for the Southern District of Indiana:

> I think the practice of law in the Southern District of Indiana was genuinely advantaged and enhanced by the service of all of the District Judges referred to above. Each of them brought to the bench a good mind and a strong will to conduct the business of the Southern District fairly and efficiently. They were different personalities and went about their duties in different manners, but during their terms we had . . . a functioning court which has served the public very well and upheld the principles of our legal system in admirable fashion.[150]

The following observations made by Mr. Welsh on Judges Steckler and Holder readily applies to all five of the judges remembered here. "They were human and had somewhat different political philosophies, but in their courts, in my experience and judgment, they called their shots squarely."[151]

Summing up the feelings of many practitioners, Jim Voyles commented at the conclusion of the Symposium panel discussion: "I think everybody up here would have to say that all of the federal judges that we began our practice in front of made us better lawyers."[152]

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149. *Id.* at 25.

150. Welch Letter, *supra* note 20, at 3.

151. *Id.* at 2.

152. Symposium Transcript, *supra* note 1, at 17.

FEDERAL JUDGES
FOR THE
INDIANA TERRITORY,
DISTRICT OF INDIANA,
AND
SOUTHERN DISTRICT OF INDIANA

CONSTITUTIONAL (ARTICLE III) JUDGES
WITH DATES OF COMMISSION

UNITED STATES TERRITORIAL COURT FOR THE INDIANA TERRITORY
(Created on October 6, 1800 with the establishment of the Indiana Territory.)

William Clark	October 6, 1800
John Griffin	October 6, 1800
Henry Vanderburgh	October 6, 1800
Thomas T. Davis	February 8, 1803
Weller Taylor	April 16, 1806
Benjamin Parke	April 23, 1808
James Fisk	July 2, 1812
James Scott	February 1, 1813

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF INDIANA
(Created on March 6, 1817, replacing the territorial court when Indiana was admitted as a state.)

Benjamin Parke	March 6, 1817
Jesse Lynch Holman	September 16, 1835
Elisha Mills Huntington	May 2, 1842
Caleb Blood Smith	December 22, 1862
Albert Smith White	January 18, 1864
David McDonald	December 13, 1864
Walter Quintin Gresham	December 21, 1869
William A. Woods	May 2, 1883
John Harris Baker	March 29, 1892
Albert Barnes Anderson	December 8, 1902
Robert C. Baltzell	January 13, 1925[1]
Thomas Whitten Slick	February 17, 1925[2]

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1. Assigned to the newly-created Southern District on April 21, 1928.
2. Assigned to the newly-created Northern District on April 21, 1928.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

(Created on April 21, 1928 when the state was split into northern and southern districts.)

Robert C. Baltzell	April 21, 1928
William E. Steckler	April 7, 1950
Cale James Holder	August 6, 1954
S. Hugh Dillin	September 22, 1961
James E. Noland	November 3, 1966
Gene E. Brooks	October 5, 1979
Sarah Evans Barker	March 14, 1984
Larry J. McKinney	July 27, 1987
John Daniel Tinder	August 10, 1987
David F. Hamilton	October 11, 1994
Richard L. Young	March 25, 1998

STATUTORY (ARTICLE I) JUDGES

WITH DIVISION ASSIGNMENTS AND DATES OF APPOINTMENT

MAGISTRATE JUDGES

John A. Cody, Jr.	(part-time)	New Albany	May 27, 1971[3]
Robert W. Geddes	(part-time)	Indianapolis	May 27, 1971[4]
Thomas J. Faulconer		Indianapolis	May 27, 1971
D. Joe Gabbert	(part-time)	Terre Haute	May 27, 1971
Joseph W. Annakin	(part-time)	Evansville	May 27, 1971
John Paul Godich		Indianapolis	October 1, 1973
David Miller	(part-time)	Evansville	1976
J. Patrick Endsley		Indianapolis	January 2, 1979
Jordan D. Lewis	(part-time)	Terre Haute	May 15, 1979
Kennard P. Foster		Indianapolis	May 16, 1986
Brian Williams	(part-time)	Evansville	1986
William G. Hussmann, Jr.		Evansville	April 4, 1988
V. Sue Shields		Indianapolis	January 28, 1994
Michael Naville	(part-time)	New Albany	November 23, 1995
Tim A. Baker		Indianapolis	October 1, 2001
William Lawrence		Indianapolis	November 11, 2002

3. Appointed as a commissioner in 1956.
4. Appointed as a commissioner in June, 1966.

BANKRUPTCY JUDGES

Nicholas W. Sufana	1979[5]
Richard W. Vandivier	1979[6]
Robert L. Bayt	1979[7]
Michael H. Kearns	February 14, 1980
Frank J. Otte	October 1, 1986
Basil H. Lorch III	April 14, 1992
Anthony J. Metz III	November 14, 1997
James K. Coachys	October 1, 2000

CLERKS OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA

WITH DATES OF APPOINTMENT

Albert Sogemeier	1928
Maurice Graston	1939
Robert Newbold	1941
Arthur Beck	1969
William Heede	1977
John A. O'Neal	1984
A. Victoria Thevenow	1994
Geraldine Treutelaar Crockett	1995
Laura A. Briggs	1998

CLERKS OF THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF INDIANA

WITH DATES OF APPOINTMENT

Sam Conner	1980
Dennis Burton	1989
John O'Neal	1994

5. Appointed as a bankruptcy referee in 1963.
6. Appointed as a bankruptcy referee in 1973.
7. Appointed as a bankruptcy referee on March 7, 1977.

CHIEF UNITED STATES PROBATION OFFICERS

WITH DATES OF APPOINTMENT

Harvey L. Hire	May 3, 1951
Knute F. Dobkins	January 22, 1964
Woodrow Wilson (Woody) Pence	December 29, 1973
Edward Parks	September 12, 1978
David H. Sutherlin	November 1, 1981
Frank D. Hall, Jr.	March 1, 1983
Barbara J. Roembke	August 12, 2002

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ARTICLE

DUAL OFFICE ANALYSIS: CAN THE LEGISLATURE CARVE OUT EXCEPTIONS?

GREGORY ZOELLER*

INTRODUCTION

Every year the Attorney General's office receives numerous inquiries as to whether an individual who already holds one position in government is prohibited from attempting another position somewhere else in government, or worse, has already accepted a second position. Over time,[1] the Attorney General's office has developed a four-step analysis to determine if holding more than one office is permitted. The focus of this analysis is primarily based upon the intent of the framers of the Indiana Constitution.

Framers of both the U.S. Constitution and the Indiana Constitution feared that democracy could not flourish with too much power in the hands of too few. They understood the "best way to preserve liberty was to divide power. If power is concentrated in any one place, it can be used to crush individual liberty."[2] Individuals holding more than one office or doing multiple governmental functions can lead to power being consolidated into the hands of a few. Historically, whether dual office holding appears to be an abuse of patronage and corruption or a means for opportunistic politicians to use political influence to enhance power and personal gain, plural office holdings have been a constant issue.

The Indiana Constitution of 1816 established that each of the three coordinate branches of state government maintains a sphere of power that is constitutionally protected.[3] However, dual offices weakened those protections

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1. Since the expansion of government positions at the state and local levels during the early 1930's with the New Deal, the Attorney General's office has begun issuing opinions. One of the first was a 1933 opinion. Ind. Op. Att'y Gen. 170 (1933).

2. PAUL E. PETERSON, THE PRICE OF FEDERALISM 6 (1995).

3. 1 CHARLES KETTLEBOROUGH, CONSTITUTION MAKING IN INDIANA: A SOURCE OF CONSTITUTIONAL DOCUMENTS WITH HISTORICAL INTRODUCTION AND CRITICAL NOTES 89 (1916).

by creating circumstances where individuals experienced competing loyalties. Because of these concerns and the additional influence from the Jacksonian populist movement, Indiana's Constitutional Convention in 1851 amended the constitution creating a specific ban on dual state-office holdings.[4] Even though the prohibition on dual office holding has remained unchanged for over 150 years, questions still arise as to how one determines whether holding multiple offices is a conflict and whether exceptions to the "dual office" prohibition in Indiana's Constitution enacted by the legislature are, in effect, slowly eroding the constitutional protections.

The dual office ban under article II, section 9 is complimentary to article III, section 1 of the Indiana Constitution regarding the separation of powers. The concept of separating the powers within government is one of the fundamental principles of American constitutionalism at both the federal and state levels. Legislative, executive, and judicial powers are allocated to each of the branches of government allowing the branches to be independent of each other. The purpose of this separation is to ensure the preservation of each citizen's liberty. Framers of the federal and state constitutions understood that in order to be effective, the governmental branches must be endowed with various powers. However, power is subject to abuse. To limit this risk of abuse, the necessary powers of government are divided among three branches.[5]

This prevailing theme of separation of powers was fueled by a fear that one department, over time, could gain influence over the others.[6] "The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[7] Therefore, the courts have relied on the separation of

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4. *Id*; *see also* IND. CONST. art. II, § 9. The Indiana Constitution of 1816 contained a prohibition against Dual Office Holdings in article XI, section 13 but it was rarely enforced because the population was so sparse that certain rural areas required multiple office holders. IND. HISTORICAL COLLECTIONS REPRINT FOR IND. HISTORICAL BUREAU, DEBATES IN INDIANA CONVENTION 1850, at 1308-11 (1935).

5. THE FEDERALIST No. 51, at 323 (James Madison) (J. Cooke ed., 1961).

> In a single republic, all the power surrendered by the people, is submitted to the administration of a single government . . . into distinct and separate departments. In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments.

Id.

6. THE FEDERALIST No. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961):

> It is agreed on all sides, that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident, that none of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers. It will not be denied that power is of an encroaching nature and that it ought to be effectually restrained from passing the limits assigned to it.

Id.

7. *Id.* at 301.

powers doctrine to limit plural office holders.[8]

Dual office holding, or "incompatibility," was a major concern for the framers of the first state constitutions.[9] It is important to note that the broad ban on plural office holding in the constitutions of some states was first conceived as an anti-corruption measure.[10] Consequently, many states chose to go beyond the principles of separation of powers and include a direct prohibition against individuals holding more than one office.[11]

In some states, such as Indiana, courts have been able to rely on other constitutional provisions rather than constitutional principles. The framers of the Indiana Constitution created article III, section 1 in response to the fear of one branch of government influencing another. The Indiana framers even went a step further and created a direct prohibition against individuals holding more than one office by ratifying article II, section 9, which is the focus of this paper. Many other states have done the same by including limitations on dual office holders.[12]

Unlike article III, section 1, article II, section 9 seems to have been founded less in the "separation-of-powers theory than in the Framers' vivid memory of the British Kings' practice of 'bribing' Members of Parliament (M.P.s) and judges with joint appointments to lucrative executive posts. This corrupt practice was repeated in the colonies, which, after independence, enacted strict constitutional bans on plural office holding."[13] "Surprisingly, the separation-of-powers aspect of incompatibility seems not to have been the major theme."[14] As the Indiana Supreme Court explained in *Book v. State Office Building Commission*,

> Article 3, § 1 is not a law against dual office holding. It is not necessary to constitute a violation of the Article, that a person should hold an office in two departments of Government. It is sufficient if he is an officer in one department and at the same time is performing functions belonging to another.[15]

Therefore, though article III, section 1 and article II, section 9 are both used in a dual office analysis, the articles are separate and distinct constitutional provisions.

Over the years, the courts have generally adopted a process in analyzing dual office holdings. The Attorney General's office has adopted this process and formalized it by developing a four-step analysis to determine whether a public

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8. Lafayette, Muncie, & Bloomington R.R. Co. v. Geiger, 34 Ind. 185, 197 (1870); *see also* Tucker v. State, 35 N.E.2d 270, 279 (Ind. 1941).

9. *See* Steven G. Calabresi & John L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1057-61 (1994).

10. *Id.* at 1060.

11. *Id.* at 1152.

12. *Id.* at 1058-61.

13. *Id.* at 1051.

14. *Id.* at 1060.

15. 149 N.E.2d 273, 296 (Ind. 1958) (citing State *ex rel.* Black v. Burch, 80 N.E.2d 294, 311 (Ind. 1948); Monaghan v. Sch. Dist. No. 1, Clackamas County, 315 P.2d 797, 802-04 (Or. 1957)).

service position held by an individual violates any part of the Indiana Constitution. The first step involves the application of article II, section 9's prohibition against dual offices by analyzing whether the individual's employment status within government is that of an office holder and, if so, whether the office is a "lucrative office."[16] If no violation is found or no exemption exists, step two involves an analysis as to whether the positions require the individual to function in violation of the separation of powers doctrine under article III, section 1.[17] Third, the positions being held simultaneously are examined to determine whether they present a conflict of interest or a public policy concern. Finally, in the fourth-step, there is an inquiry as to any other prohibition by local ordinances or regulations.

This Article begins by discussing how the Framers of the U.S. Constitution and early state constitutions feared corruption and consolidated power enough to include a prevailing theme of separation of powers as well as, in the case of some states, specific amendments against dual office holding. The Article will then embark on the analysis that takes place when the Indiana Attorney General is faced with a dual office issue. The analysis begins by describing the application of article II, section 9, which focuses on whether a position is an office and if that office is lucrative. The article II, section 9 analysis concludes with a discussion of legislative encroachment on article II, section 9. The Article then addresses the second constitutional provision relevant in a dual office analysis by explaining the "Separation of Powers" clause in article III, section 1 and its application within the dual office dilemma. The Article continues with the analysis to determine whether dual offices were found to be against public policy because of conflict of interest or incompatibility. Finally, the Article will conclude with the remedies and the procedure to determine one's right to office.

II. HISTORY AND BACKGROUND OF THE DUAL OFFICE DILEMMA

The Framers of the U.S. Constitution feared corruption and consolidated power, which resulted in the prevailing themes of separation of powers, and checks and balances. The Framers adhered to these doctrines to prevent power

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16. *See* Wells v. State *ex rel.* Peden, 94 N.E. 321 (Ind. 1911); Bishop v. State *ex rel.* Griner, 48 N.E. 1038 (Ind. 1898); Chambers v. State *ex rel.* Barnard, 26 N.E. 893 (Ind. 1891); Foltz v. Kerlin, 4 N.E. 439 (Ind. 1886); Howard v. Shoemaker, 35 Ind. 111 (1871); Dailey v. State, 8 Blackf. 329 (Ind. 1847); Sharp v. State, 99 N.E. 1072 (Ind. App. 1912); *see also* 14 Ind. Op. Att'y Gen. 1 (1991); 7 Ind. Op. Att'y Gen. 1 (1989); 4 Ind. Op. Att'y Gen. 1 (1989); 12 Ind. Op. Att'y Gen. 201 (1988); 5 Ind. Op. Att'y Gen. 149 (1988); 9 Ind. Op. Att'y Gen. 24 (1981); 3 Ind. Op. Att'y Gen. 9 (1980); 39 Ind. Op. Att'y Gen. 258 (1967); 22 Ind. Op. Att'y Gen. 140 (1967); 67 Ind. Op. Att'y Gen. 474 (1967); 15 Ind. Op. Att'y Gen. 66 (1962); 30 Ind. Op. Att'y Gen. 173 (1961); 18 Ind. Op. Att'y Gen. 87 (1961); 13 Ind. Op. Att'y Gen. 57 (1957); 12 Ind. Op. Att'y Gen. 54 (1957); 78 Ind. Op. Att'y Gen. 236 (1951); 72 Ind. Op. Att'y Gen. 216 (1951); 40 Ind. Op. Att'y Gen. 201 (1947).

17. *Burch*, 80 N.E.2d at 294; State *ex rel.* v. Kirk, 44 Ind. 401 (1873); 18 Ind. Op. Att'y Gen. 87 (1961).

from being consolidated in the hands of a small number of government officials and to prevent one branch of government from dominating another. This concern resulted in a prohibition against members of Congress also holding a federal executive or judicial position.[18]

The Framers were greatly influenced by English Whigs who relied on history of "the corrupting effect of plural office holding and royal patronage on the conduct of politics in Seventeenth and Eighteenth Century of England."[19] English Monarchs used patronage to control Parliament. The Monarch promoted influential Members of Parliament to ministerial office or used the incentive of a lucrative office, pension, or title of nobility to induce Members of Parliament to support both the Crown and its programs.[20] The British Parliament passed a rule, as part of the Regency Act of 1705, to curtail this corrupting use of patronage.[21] The Act required "any new ministers appointed from the ranks of Parliament to resign their legislative seats and stand for reelection, thus affording the electorate the opportunity to refuse the presence of the King's ministers in Parliament."[22]

The separation of powers principle began as a "colonial attempt to prevent the Crown-appointed governors from buying off members of the legislature. These governors, in imitation of the court in England, would offer lucrative positions in the executive branch to key members of the legislature."[23] Furthermore, the absence of hereditary nobility made the patronage problem worse in America because it meant that appointive offices were often the primary source of social distinction.[24] "The colonists successfully resisted this patronage and instituted prohibitions on holding several offices at once."[25]

In his farewell address of 1796, George Washington warned against the encroachment of one branch on the powers of another and cautioned against the destruction of the government by an abuse of the separation of powers principle.[26] Additionally, Thomas Jefferson wrote, "convention which passed the

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18. U.S. CONST. art. I, § 6, cl. 2 ("[N]o Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.").

19. Calabresi & Larsen, *supra* note 9, at 1053.

20. *Id.* (citing SIR DAVID L. KEIR, THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485, at 283 (9th ed. 1969)).

21. *Id.* at 1056 (citing Regency Act of 1705, 4 Ann. c. 8, §§ 24, 25 (Eng.)).

22. *Id.*

23. DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 156-57 (1988).

24. *Id.* (referencing GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776-1787, at 143 (1969)).

25. *Id.*

26. Book v. State Office Bldg. Comm'n, 149 N.E.2d 273, 294 (Ind. 1958) (quoting George Washington, Farewell Address (1796)):

> It is important, likewise, that the habit of thinking in a free country should inspire caution, in those intrusted with its administration, to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate

ordinance of government, laid its foundation on this basis, that the legislative, executive, and judiciary departments should be separate and distinct, so that no person should exercise the powers of more than one of them at the same time."[27] The Framers of the U.S. Constitution were adamant about not allowing a party in one branch of government to have power or influence over another branch.

However, the text of the U.S. Constitution is silent on the subject of dually held federal and state office positions. Perhaps this was because it was widely believed that Congress might respond better to the interests of the states if individuals held both state and federal positions.[28] Also, there was a desire and need to attract the best politicians to national service even if those same politicians held state offices.[29] Regardless of the historical reasons for the Constitution's silence on the matter, today the general rule regarding holding multiple positions in the federal government is that one individual may not simultaneously hold federal and state offices.[30] In fact, forty-seven out of fifty states have state constitutional clauses prohibiting individuals from holding federal office and serving in state legislatures.[31]

Framers of the state constitutions, including Indiana's, relied on those same principles considered important in forming the U.S. Constitution. However, state framers did not stop at the reallocation of the appointment power and the office-creating power as was the focus of the pre-constitutional colonial times. While the immediate goal of dual-office clauses

> was to stop corruption and curb executive power, the clauses also expressed American egalitarianism and rejection of the English social hierarchy. Many people who previously had been denied the right to vote or hold political office believed that the primary purpose of the

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> the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A just estimate of the love of power, and proneness to abuse it, which predominates in the human heart, is sufficient to satisfy us of the truth of this position. The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositories, and constituting each the Guardian of the Public Weal against invasions by the others, has been evinced by experiments, ancient and modern; some of them on our country and under our own eyes. To preserve them must be as necessary as to institute them. If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the constitution designates. But let there be no change by usurpation; for, though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed.

Id.

27. Thomas Jefferson, *Notes on the State of Virginia, 1781-1785*, *in* THE COMPLETE JEFFERSON 648, 649 (Saul K. Padover ed., 1943).

28. Calabresi & Larsen, *supra* note 9, at 1050.

29. *Id.* at 1049-50.

30. *Id.* at 1151.

31. *Id.*

> American Revolution had been to abolish the political institutions by which privilege had been maintained in the colonial governments.[32]

State constitutions were written to discourage the formation of a professional politician or courtier class that would be removed from the public at large.[33] The new American office holder was to be a "virtuous amateur, who would put aside his plow for a time to serve the people."[34] Such an office holder was thought to embody the concept of pure democratic representation by allowing for the participation of a great cross section of citizens in government rather than only an elite appointed class.

For example, the Pennsylvania Constitution of 1776 expressed contempt for the office-holding class as did North Carolina's Constitution.[35] "Virtually every state constitution written between 1776 and 1787 prohibited holding several offices at once."[36] These very early state constitutional prohibitions are similar to article II, section 9, which was added to the Indiana Constitution in 1851.[37] The Indiana Constitution of 1816 mentioned the dual office prohibition. However, it was of little emphasis until restrictions on the legislative process and popular election of the judiciary to curb its independence—a principle of Jacksonian democracy—led to a constitutional convention and the adoption of a new Indiana Constitution.[38] Since 1851, little in the Indiana Constitution has changed. Only thirty-eight amendments have passed in two separate and consecutive sessions of the General Assembly, as required by the constitution, and of these only twenty have been ratified by the people.[39] As of January 1, 1998, Indiana's 1851 Constitution, had an amendment rate of .27.[40] Only

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32. *Id.* at 1060 (quoting Robert F. Williams, *"Experience Must Be Our only Guide": The State Constitutional Experience of the Framers of the Federal Constitution*, 15 HASTINGS CONST. L.Q. 403, 411 (1988)).

33. JAMES SCHOULER, CONSTITUTIONAL STUDIES STATE AND FEDERAL 63 (Da Capo Press 1971) (1897).

34. Calabresi & Larsen, *supra* note 9, at 1060 (quoting Lawrence M. Friedman, *State Constitutions in Historical Perspective*, 496 ANNALS AM. ACAD. POL. & SOC. SCI. 37 (1988)).

35. *Id.* "As every freeman . . . ought to have some profession, calling, trade or farm, whereby he may honestly subsist, there can be no necessity for, nor use in establishing offices of profit, the usual effects of which are dependence and servility unbecoming freemen, in the possessors and expectants." *Id.* (quoting PA. CONST. of 1776, § 36). Additionally the North Carolina Constitution of 1776 provided that "no person in the State shall hold more than one lucrative office at any one time." *Id.* (quoting N.C. CONST. of 1776, art. XXXV).

36. LUTZ, *supra* note 23, at 161.

37. *Id.*

38. Price v. State, 622 N.E.2d 954, 962 (Ind. 1993).

39. Donald S. Lutz, *Patterns in the Amending of American State Constitutions*, *in* CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS 32-33 (G. Alan Tarr ed., 1996).

40. The amendment rate means that of all the amendments brought to the floor of the General Assembly, only .27 of them are passed by two separate and consecutive sessions of the General

Vermont and Tennessee have been amended less frequently.[41] Article II, section 9, the prohibition against dual offices in Indiana, has not been altered.

III. ANALYSIS OF THE PROHIBITION AGAINST DUAL OFFICES—ARTICLE II, SECTION 9

The Indiana Constitution prohibits a person from holding more than one lucrative office at a time. Article II, section 9 of the Indiana Constitution states:

> No person holding a lucrative office or appointment under the United States or under this State is eligible to a seat in the General Assembly; and no person may hold more than one lucrative office at the same time, except as expressly permitted in this Constitution. Offices in the militia to which there is attached no annual salary shall not be deemed lucrative.[42]

In most situations, two determinations must be made under article II, section 9 of the Indiana Constitution: (1) whether both positions are offices and (2) whether both positions are lucrative. If either of the two positions is not an office, there is no violation of article II, section 9. If either of the two positions is not lucrative, there is no violation of article II, section 9.

A. What Is an Office?

The Indiana Supreme Court has defined "office" in relation to article II, section 9, of the Indiana Constitution as follows:

> An office is a public charge or employment, in which the duties are continuing, and prescribed by law and not by contract, invested with some of the functions pertinent to sovereignty, or having some of the powers and duties which inhere within the legislative, judicial or executive departments of the government, and emolument is a usual, but not a necessary element thereof.[43]

The Indiana Supreme Court did not look solely to compensation to determine whether an office under article II, section 9 existed.[44] The court first looked to the functions and duties required by the position. The Indiana Supreme Court explained that an office is:

> "a position or station in which a person is employed to perform certain

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Assembly and then ratified by the people.

41. Lutz, *supra* note 39, at 32-33.

42. IND. CONST. art. II, § 9; *see also* IND. CODE § 3-8-1-3 (2003) ("A person may not hold more than one (1) lucrative office at a time, as provided in Article 2, Section 9 of the Constitution of the State of Indiana.").

43. *See* Book v. State Office Bldg. Comm'n, 149 N.E.2d 273, 290 (Ind. 1958) (citing Wells v. State *ex rel.* Peden, 94 N.E. 321 (Ind. 1911)).

44. *See* Indianapolis Brewing Co. v. Claypool, 48 N.E. 228, 230 (Ind. 1897).

> duties, or by virtue of which he becomes charged with the performance of certain duties, public or private; a place of trust." From these definitions, and we think they are correct, it is quite apparent that compensation is not indispensable to the existence or creation of an office within the meaning of the constitution.[45]

The court went on to say that circumstance denies the commissioners of their character as officers "because the act provides some compensation for them, namely, their expenses."[46]

> It is the creation of an office with a certain tenure that is forbidden. Webster defines the word "office" to be "a special duty, trust, or charge, conferred by authority and for a public purpose; an employment undertaken by the commission and authority of the government, as civil, judicial, executive, legislative, and other offices." Burrill's Law Dictionary defines the word "office" to mean "a position or station in which a person is employed to perform certain duties, or by virtue of which he becomes charged with the performance of certain duties, public or private; a place of trust."[47]

The court concluded from these definitions that it was quite apparent that "compensation is not indispensable to the existence or creation of an office within the meaning of the constitution. So that the office of park commissioner is an office, within the meaning of the constitutional restriction."[48]

Initially, the Indiana Supreme Court construed article II, section 9 to apply only to "lucrative offices" at the state level. For example, in *Kirk* a court determined that an office is not a lucrative office for the purposes of article II, section 9 if the duties are "wholly municipal in character."[49] In *Kirk*, the court was required to decide whether Kirk, who had been duly appointed to the state office of prison director of the Indiana State Prison South, could continue to hold that office after being elected as a Madison city councilman.[50] The court concluded, "[t]he office of councilman in a city, although a lucrative office in the ordinary sense of the word, is not a lucrative office within the ninth section of the second article of the constitution,"[51] based on the reasoning that "[t]he office of councilman is an office purely and wholly municipal in its character . . . [with] no duties to perform under the general laws of the State."[52]

However, the holding in *Kirk* was narrowly construed in *Chambers v. State*

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45. *Id.* (quoting BURRILL'S LAW DICTIONARY).

46. *Id.*

47. *Id.*

48. *Id.*

49. State *ex rel.* Platt v. Kirk, 44 Ind. 401, 406 (1873); *see also* Chambers v. State *ex rel.* Barnard, 26 N.E. 893 (Ind. 1891); Howard v. Shoemaker, 35 Ind. 111 (1871).

50. *Kirk*, 44 Ind. at 402-03.

51. *Id.* at 408.

52. *Id.* at 406.

ex rel. Barnard:

> It must, therefore, be regarded as the settled law of this State that if an office is purely municipal, the officer not being charged with any duties under the laws of the State, he is not an officer within the meaning of the Constitution, but if the officer be charged with *any* duties under the laws of the State and for which he is entitled to compensation, the office is a lucrative office within the meaning of the Constitution.[53]

This analysis has been used by prior Attorneys General in several opinions all of which conclude that if an office is purely municipal, it does not come within the purview of article II, section 9.[54] However, courts that have construed article II, section 9 during the last century did not dwell on whether one of the positions involved is "purely municipal."[55] Rather, the analysis has focused on whether both of two lucrative positions are "offices," with a distinction being made between an "employee" and an "officer."

The courts have explained the distinction between a "public officer" and an "employee" by finding a difference between an office and an employment: "An office, as opposed to an employment, is a position for which the duties include the performance of some sovereign power for the public's benefit, are continuing, and are created by law instead of contract."[56] "The most important characteristic which may be said to distinguish an office from an employment is that the duties of the incumbent of an office must involve an exercise of some portion of the sovereign power."[57] For instance, the Attorney General looked to the type of duties that arose when deciding whether a member of the Adams County Council could serve as a member of the Adams County Alcoholic Beverage Board.[58] The Attorney General determined that the County Council is required to affix and adopt tax rates for various townships and has the duty of appropriating moneys for expenditures within the County. Therefore, the duties were clearly an exercise of the sovereignty of the state.[59]

Some courts look at the differences between the definition of employee and an officer. An employee is defined as, "[a] person in the service of another under any contract of hire, express or implied, oral or written, where the employer has the power or right to control and direct the employee in the material detail of how

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53. 26 N.E. at 894 (emphasis added).

54. *See, e.g.*, 6 Ind. Op. Att'y Gen. 29, 31 (1949); 110 Ind. Op. Att'y Gen. 469, 471 (1944); Ind. Op. Att'y Gen. 693, 695 (1943).

55. Since the 1980 adoption of Home Rule, it is doubtful that any office can be deemed "purely municipal." *See* IND. CODE §§ 36-1-3-1 to -9 (West 1997); *see also* 14 Ind. Op. Att'y Gen. 1 (1991) (noting that "[u]nder Home Rule, the State has delegated to cities many powers and duties concerning the sovereign powers of the State in relation to health, welfare and safety").

56. Gaskin v. Beier, 622 N.E.2d 524, 528 (Ind. Ct. App. 1993).

57. Shelmadine v. City of Elkhart, 129 N.E. 878, 878 (Ind. App. 1921).

58. 78 Ind. Op. Att'y Gen. 236 (1951).

59. *Id.* at 237.

the work is to be performed."[60] "Generally, one who holds an elective or appointive position for which the public duties are prescribed by law is a 'public officer.'"[61] Courts have distinguished an officer from an employee by looking at "the greater importance, dignity and independence of his position; in being required to take an official oath, and perhaps to give an official bond."[62] Courts have also drawn a distinction by looking at "[the officer's] power of supervision and control and by his liability to be called to account as a public offender in case of malfeasance in office."[63] Other important tests courts may consider when distinguishing between an office and employment are:

> [T]he tenure by which a position is held, whether its duration is defined by the statute or ordinance creating it, or whether it is temporary or transient or for a time fixed only by agreement; whether it is created by an appointment or election, or merely by a contract of employment by which the rights of the parties are regulated; whether the compensation is by a salary or fees fixed by law, or by a sum agreed upon by the contract of hiring.[64]

B. Is the Position in Question Lucrative?

The second determination to see if a dual office holding infringes on article II, section 9 is whether an office is lucrative. "The constitutional provision against the holding of more than one lucrative office at the same time goes to the character of the office rather than to whether the officer draws two salaries."[65] However, some type of compensation or payment is generally required for an office to be considered lucrative. A lucrative office as used in article II, section 9 is defined as "[a]n office to which there is attached compensation for services rendered. . . . Pay, supposed to be an adequate compensation, is affixed to the performance of their duties."[66] "Webster defines the word lucrative to mean 'yielding lucre; gainful; profitable; making increase of money or goods; as a lucrative trade; lucrative business or office.'"[67]

A person holds a lucrative office under article II, section 9 when he or she holds title to an office in which he or she is authorized to exercise some of the

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60. Common Council of Peru v. Peru Daily Tribune, Inc., 440 N.E.2d 726, 729 (Ind. Ct. App. 1982) (quoting BLACK'S LAW DICTIONARY 471 (5th ed. 1979)).

61. *Gaskin*, 622 N.E.2d at 528 (quoting Mosby v. Bd. of Comm'rs of Vanderburgh County, 186 N.E.2d 18, 20-21 (Ind. App. 1963)).

62. *Common Council of Peru*, 440 N.E.2d at 730 (quoting Hyde v. Bd. of Comm'rs of Wells County, 1987 N.E. 333, 337 (Ind. 1935)).

63. *Mosby*, 186 N.E.2d at 21.

64. *Common Council of Peru*, 440 N.E.2d at 731 (citing *Hyde*, 198 N.E. at 337).

65. 57 Ind. Op. Att'y Gen. 219 (1949) (quoting 1955 Ind. Op. Att'y Gen. 1 (1936)).

66. State *ex rel.* Platt v. Kirk, 44 Ind. 401, 405 (1873).

67. *Id.*

state's sovereign power and where the person is entitled to compensation.[68] Essentially, if state law grants any of the state's power (i.e., eminent domain, prosecution, taxation) to a public service position and the person holding such public service position is entitled to get any amount of money for serving in that public service position, then the public service position is considered a lucrative office for purposes of article II, section 9. Whether an individual receives compensation or not does not change the character of the office from lucrative to non-lucrative, even if the individual did not receive compensation.[69] The office is considered lucrative even if a person chooses not to accept compensation as long as the person is entitled to the pay affixed to the performance of the office's duties.[70] Such compensation can be salary or per diem (per day). Only pure reimbursement does not constitute compensation.[71]

The Supreme Court of Indiana in the case of *Book v. State Office Building Commission*, defined a lucrative office as follows: "'Lucrative office' as the term is used in Article 2, Section 9, of the Constitution of Indiana has been considered and defined by this court since the year 1846 as an office to which there is attached a compensation for services rendered."[72] The court determined that "[w]hile members of the State Office Building Commission are charged with certain duties under the Act creating the Commission, they receive no compensation for their services, and under the definition adopted by this court membership on the Commission does not constitute a lucrative office."[73]

Thus, the court held, in effect, that mere reimbursement for actual expenses was not sufficient to constitute compensation for services rendered. Therefore, as far as the "lucrative office" question is concerned, there would be no violation of the Indiana Constitution by one individual holding both offices for the reason that the essential element of compensation or per diem for services rendered is lacking.[74]

In a past opinion the Attorney General considered other per diem statutory provisions explaining that "[a] per diem is not a fee, salary or wages. It is a compensation for a service given the government for a day or a part of a day."[75] "The lucrativeness of an office—its net profits—does not depend upon the amount of compensation affixed to it."[76] In *Dailey v. State*, in speaking of the offices of recorder and county commissioner, the court said that it considered

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68. Book v. State Office Bldg. Comm'n, 149 N.E.2d 273, 289-90 (Ind. 1958).

69. 45 Ind. Op. Att'y Gen. 258 (1960).

70. Dailey v. State, 8 Blackf. 329 (Ind. 1847).

71. 45 Ind. Op. Att'y Gen. 259 (1960) (explaining *Book*, 149 N.E.2d at 289).

72. 149 N.E.2d at 289.

73. *Id. See also* Crawford v. Dunbar, 52 Cal. 36, 39 (1877); Wells v. State *ex rel.* Peden, 94 N.E. 321 (Ind. 1911); Chambers v. State *ex rel.* Barnard, 26 N.E. 893, 894 (Ind. 1891); Platt v. Kirk, 44 Ind. 401, 405 (1873); State *ex rel.* Little v. Slagle, 89 S.W. 326, 327 (Tenn. 1905).

74. *See* 45 Ind. Op. Att'y Gen. 259 (1960) (determining that because library board members did not receive compensation or per diem, the position was not considered a "lucrative office").

75. 70 Ind. Op. Att'y Gen. 260 (1954).

76. *See Book*, 149 N.E.2d at 289 (quoting *Kirk*, 44 Ind. at 405-06).

them both lucrative offices.[77] In discussing lucrative, the court said:

> Pay, supposed to be an adequate compensation, is affixed to the performance of their duties. We know of no other test for determining "lucrative office" within the meaning of the constitution. The lucrativeness of an office—its net profits—does not depend upon the amount of compensation affixed to it. The expenses incident to an office with a high salary may render it less lucrative, in this latter sense, than other offices having a much lower rate of compensation.[78]

The Attorney General determined that the per diem allowance to a member of the County Plan Commission was to be considered as compensation for a service given the county.[79] Even if the officeholder chooses not to accept the compensation, the office is still considered lucrative so long as the individual is entitled to the pay affixed to the office.[80]

A former Attorney General concluded, after examining the powers, duties, and nature of the office of trustee of a sanitary district, that a lucrative office existed.[81] The Attorney General determined that the office was lucrative as indicated by the provision for compensation.[82]

If both public service positions are lucrative offices, then there is a violation of article II, section 9's prohibition against dual office holding. This means that a person may not hold both offices at the same time, and this ends analysis of the problem. If, on the other hand, one determines that one of the public service positions is a lucrative office, then one must continue with step two of the four step analysis.

If a lucrative state office holder accepts a second lucrative state office, then the acceptance of the second lucrative state office automatically vacates the first office.[83] Thus, the first office becomes vacant and a successor will need to be appointed or elected, depending on the law applicable to the office.[84] Where a person is appointed and accepts a lucrative state office and continues to hold a lucrative federal office, the state court may expel that person from state office if the person persists in holding the lucrative federal office.[85]

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77. 8 Blackf. 329, 330 (Ind. 1847).

78. *Id.*

79. 70 Ind. Op. Att'y Gen. 260 (1954) (explaining that a State Representative could not be on Marion County Plan Commission because the per diem allowance was to be considered compensation for a service given the county).

80. *Dailey*, 8 Blackf. at 329.

81. Ind. Op. Att'y Gen. 88, 89 (1942).

82. *Id.*

83. *See, e.g.*, Wells v. State *ex rel.* Peden, 94 N.E. 321, 323 (Ind. 1911); Bishop v. State *ex rel.* Griner, 48 N.E. 1038, 1041 (Ind. 1898); Chambers v. State *ex rel.* Barnard, 26 N.E. 893, 894 (Ind. 1891); 30 Ind. Op. Att'y Gen. 149 (1947); Ind. Op. Att'y Gen. 270, 272 (1938); Ind. Op. Att'y Gen. 254, 255 (1933); 77 Ind. Op. Att'y Gen. 235 (1951).

84. Gosman v. State, 6 N.E. 349, 353 (Ind. 1886).

85. Foltz v. Kerlin, 4 N.E. 439, 440-41 (Ind. 1886); 17 Ind. Op. Att'y Gen. 83 (1987).

C. Previously Recognized Exemption

In some cases where both positions are considered lucrative offices, one of the positions may be found to have been specifically exempted by statute from the lucrative office restriction. For instance, using the foregoing analysis, courts have frequently held that an appointed deputy is an "office" within the meaning of article II, section 9.[86]

However, in the 1980s, the General Assembly enacted legislation specifically allowing "members of any township, town, or city . . . police department"[87] and "[a]ny county police officer"[88] to run for and serve as an elected officer and to be appointed to and serve in any office if so appointed. In light of such legislation, courts have subsequently held that "a deputy [town] marshal is an employee rather than a public officer,"[89] and that "a deputy sheriff is an employee of the county, rather than a public officer."[90] The General Assembly even went a step further, and in 1999, the General Assembly passed P.L. 176-1999, codified at Indiana Code section 5-6-4-3, which explicitly characterizes appointed deputies as non-officer holders; "[f]or purposes of Article 2, Section 9 of the Constitution of the State of Indiana, the position of *appointed deputy* of an officer of a political *subdivision or a judicial circuit is not a lucrative office*."[91]

Prior to the legislature passing Indiana Code section 5-6-4-3, courts had determined that a prosecuting attorney was clearly an "officer of . . . a judicial circuit."[92] Based on Indiana Code section 5-6-4-3, an appointed deputy prosecuting attorney is not a "lucrative office" and thus is not precluded from holding office in an elected position on the municipal or county level.

However, Indiana Code section 5-6-4-3 has not been challenged or construed by a court, and neither *Hill* nor its legal analysis concerning an "office" under article II, section 9 has been disapproved. Accordingly, a court may reach a different result. Nevertheless, in construing similar legislation as it relates to police officers, the *Gaskin* court noted that: "The legislature is the arbiter of public policy. Indiana Code section 36-8-3-12, which specifically authorizes a town

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86. *See, e.g.*, Hill v. State, 11 N.E.2d 141, 144 (Ind. 1937) ("A deputy prosecuting attorney is vested with power by express statutory provisions to perform the duties of the prosecuting attorney. He is a public officer and appointed to discharge the duties of the particular office. His acts are the acts of his principal.") (citation omitted); *Wells*, 94 N.E. at 321 (deputy county auditor is an "officer"); Union Township of Montgomery County v. Hays, 207 N.E.2d 223 (Ind. App. 1965) (deputy township assessor is an "officer"). *See generally* 1 Ind. Op. Att'y Gen. *1 (1997).

87. IND. CODE § 36-8-3-12 (2003).

88. *Id.* § 36-8-10-11(c).

89. Gaskin v. Beyer, 622 N.E.2d 524, 528 (Ind. Ct. App. 1993).

90. Harden v. Whipker, 646 N.E.2d 727, 729 (Ind. Ct. App. 1995).

91. IND. CODE § 5-6-4-3 (2003) (emphasis added).

92. *See, e.g.*, State *ex rel.* McClure v. Marion Superior Court, 158 N.E.2d 264, 267 (Ind. 1959).

police officer to be a candidate for elective office and to serve if elected, is a clear statement of public policy by the legislature which we are constrained to follow."[93] In the absence of Indiana Code section 5-6-4-3, one would anticipate that the offices of deputy prosecuting attorney and city council member are both "lucrative offices" which cannot be held simultaneously. Since the constitutionality of Indiana Code section 5-6-4-3 had not been tested, it is not certain that the courts would defer to the General Assembly's declaration of public policy in interpreting the constitution.[94] If a court were to hold that Indiana Code section 5-6-4-3 authorizes the holding of dual lucrative offices in violation of article II, section 9, the court's interpretation would prevail.

Another example of an exempted position is any position on a public safety board.[95] Safety boards are city-level administrative bodies that are charged with oversight of the city's police and fire departments.[96] In addition, the safety board has exclusive control over other aspects of a city's public safety needs including animal shelters, inspection of buildings, equipment and supplies, and repairs.[97] With respect to the police department specifically, the safety board may adopt rules for the government and discipline of the police department.[98]

Some positions are not expressly exempted but may be found to be exempted through analogy. For instance, the Vanderburgh County Sheriff's Merit Board performs similar, though more restricted, functions at the county level as do the public safety boards at the city level. The merit board is responsible for adopting and enforcing rules for the discipline of members of the sheriff's department.[99] The sheriff's merit board is not charged with the broader public safety functions of safety boards; however, inasmuch as their functions overlap, the two bodies perform identical services.

Sheriffs' merit boards effectively act as safety boards at the county level. For example, in Evansville, Indiana, the seat of Vanderburgh County, the city's department of public safety has established a safety board pursuant to its authority under Indiana Code section 36-4-9-2(a)(2). The safety board is charged with the duties described in Indiana Code section 36-8-3-2. In addition, it is responsible for the oversight and discipline of the city's police department.[100] However, the safety board's jurisdiction does not extend to members of the county sheriff's department. Therefore, the sheriff's merit board is needed in order to perform the oversight and disciplinary role at the county level. Because these two boards perform the same functions with respect to law enforcement

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93. 622 N.E.2d at 530 (citation omitted).

94. *See id.*

95. IND. CODE § 36-8-3-12 (2003).

96. *Id.* § 36-8-3-2.

97. *Id.*

98. *Id.*

99. *See* Miller v. Vanderburgh County, 610 N.E.2d 858 (Ind. Ct. App. 1993).

100. *See* Cox v. Town of Rome City, 764 N.E.2d 242 (Ind. Ct. App. 2002); Chesser v. City of Hammond, 725 N.E.2d 926 (Ind. Ct. App. 2000); Burke v. Anderson, 612 N.E.2d 559 (Ind. Ct. App. 1993).

agencies and because the sheriff's merit board essentially takes the place of the safety board at the county level, it would be reasonable to extend the statutory exemption to sheriff's merit board members.

D. Legislative Encroachment on the Constitution

1. Amendment.—When the legislature creates a statute that appears to create an exception to the prohibition of holding dual offices, concern arises over whether the legislature's act improperly encroaches upon article II, section 9 or abuses article III, section 1 by influencing or affecting other branches of government. Under the Indiana Constitution, the General Assembly of our state is granted legislative authority in the words of article IV, section 1.[101] The exercise of the lawmaking power conferred upon the General Assembly is subject

> only to such limitations as are imposed, expressly or by clear implication, by the state Constitution and the restraints of the federal Constitution and the laws and treaties passed and made pursuant to it, has been uniformly declared by an unbroken line of decisions of this court from the beginning of the judicial history of the state to the present.[102]

However, the authority granted "to exercise the legislative element of sovereign power has never been considered to include authority over fundamental legislation."[103]

The grant to the General Assembly of "the legislative authority of the State" did not transfer from the people to the General Assembly all the legislative power inhering.[104] The Indiana Supreme Court has held that the words "legislative power" convey to the General Assembly the general legislative authority to make, alter and repeal laws.[105] "'Laws, in the sense in which the word is here employed, are rules of civil conduct, or statutes, which the legislative will has

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101. IND. CONST. art. IV, § 1.

> The Legislative authority of the State shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives. The style of every law shall be: "Be it enacted by the General Assembly of the State of Indiana"; and no law shall be enacted, except by bill.

Id.

102. Ellingham v. Dye, 99 N.E. 1, 3 (Ind. 1912).

103. *Id.*

104. *Id.* (citing McCullough v. Brown, 19 S.E. 458 (S.C. 1894)) ("such legislative power as may be necessary or appropriate to the declared purpose of the people in framing their constitution and conferring their powers upon the various departments constituted for the sole purpose of carrying into effect their declared purpose").

105. *Id.* at 8-9; *see also* State *ex rel.* Yancey v. Hyde, 22 N.E. 644 (Ind. 1889); City of Evansville v. State *ex rel.* Blend, 21 N.E. 267 (Ind. 1889); State *ex rel.* Jameson v. Denny, 21 N.E. 252 (Ind. 1889).

prescribed.'"[106] In *Lafayette, Muncie, & Bloomington Railroad Co. v. Geiger*, the court stated that

> [w]hen the constitution of a state vests in the General Assembly all legislative power, it is to be construed as a general grant of power, and as authorizing such legislature to pass any law within the ordinary functions of legislation, if not delegated to the federal government prohibited by the state constitution.[107]

Accompanying the grant of general legislative authority over the subject-matter of ordinary legislation found in article IV, section 1 in the Indiana Constitution is article XVI, which places with the legislature the following special power and duty in relation to fundamental legislation:

> (a) An amendment to this Constitution may be proposed in either branch of the General Assembly. If the amendment is agreed to by a majority of the members elected to each of the two houses, the proposed amendment shall, with the yeas and nays thereon, be entered on their journals, and referred to the General Assembly to be chosen at the next general election. (b) If in the General Assembly so next chosen, the proposed amendment is agreed to by a majority of all the members elected to each House, then the General Assembly shall submit the amendment to the electors of the State at the next general election. (c) If a majority of the electors voting on the amendment ratify the amendment, the amendment becomes a part of this Constitution.[108]

The constitutional and legislative history of the state suggests that the general grant of legislative authority carries the power "to formulate and submit, at will, fundamental law to the people for their action."[109] The power to change the constitution "has ever been considered to remain with the people alone, except as they had, in their Constitution, specially delegated powers and duties to the legislative body relative thereto for the aid of the people only."[110]

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106. *Ellingham*, 99 N.E. at 7 (quoting COOLEY, CONSTITUTIONAL LIMITATIONS 131 (7th ed.)).

107. 34 Ind. 185, 198 (1870).

108. IND. CONST. art. XVI, § 1.

109. *Ellingham*, 99 N.E. at 8.

110. *Id.*; *see also* State v. Swift, 69 Ind. 505, 519 (1880). In the opinion of the court by Chief Justice Biddle, who was a member of the constitutional convention of 1850-51:

> "The people of a State may form an original constitution, or abrogate an old one and form a new one, at any time, without any political restriction except the constitution of the United States; but if they undertake to add an amendment, by the authority of legislation, to a constitution already in existence, they can do it only by the method pointed out by the constitution to which the amendment is to be added. The power to amend a constitution by legislative action does not confer the power to break it, any more than it confers the power to legislate on any other subject, contrary to its prohibitions."

Ellingham, 99 N.E. at 18 (quoting *Swift*, 69 Ind. at 519).

The legislature's power to determine and declare the law covers "the whole body of the law, fundamental and ordinary."[111] A judicial question could arise "[w]hether legislative action is void for want of power in that body, or because the constitutional forms or conditions have not been followed or have been violated."[112] Therefore, courts have the power to exercise the authority "to determine the validity of proposal, submission or ratification of change in the organic law."[113]

2. Encroaching on Article II, Section 9.—Without an amendment, any legislation passed by the General Assembly allowing for multiple offices or expanding the duties of an office must be referenced with both article II, section 9 and article III, section 1 to see if there is a conflict. The Indiana Supreme Court has explained that every statute is "cloaked with a presumption of constitutionality."[114] The court explained that "[i]t is our duty to bring it into harmony with constitutional requirements, if the language permits. If it is capable of any constitutional interpretation, it must be upheld."[115] "A statute is not unconstitutional simply because the court might consider it born of unwise, undesirable, or ineffectual policies."[116]

> A statute is presumptively valid and will not be overthrown as unconstitutional if it can be sustained on any reasonable basis. It is the duty of courts to uphold Acts of the Legislature if it is possible to do so within rule of law, and where there is a doubt as to the constitutionality of a statute, it must be upheld. The burden is on the party attacking the constitutionality of the statute to establish the invalidating facts; and its invalidity must be clearly shown.[117]

In construing the Indiana Constitution, the Indiana Supreme Court noted that it is appropriate to look to "the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our constitution, and case law interpreting the specific provisions."[118] Added to this, the purpose underlying an Indiana constitutional provision is critical to ascertaining "what the particular constitutional provision was designed to prevent."[119]

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111. *Ellingham*, 99 N.E. at 21.

112. *Id.*

113. *Id.* (citing *In re* Denny, 59 N.E. 359 (Ind. 1901); State v. Swift, 69 Ind. 505 (1880)).

114. *In re* Public Law No. 154-1990, 561 N.E.2d 791, 791 (Ind. 1990); *see also* B&M Coal Corp. v. United Mine Workers of Am., 501 N.E.2d 401 (Ind. 1986); Am. Nat'l Bank & Trust Co. v. Ind. Dep't of Highways, 439 N.E.2d 1129 (Ind. 1982).

115. *In re Public Law No. 154-1990*, 561 N.E.2d at 791 (citing Progressive Improvement Ass'n v. Catch All Corp., 258 N.E.2d 403 (Ind. 1970)).

116. *Id.* (citing Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585, 591 (Ind. 1980)).

117. Book v. State Office Bldg. Comm'n, 149 N.E.2d 273, 280 (Ind. 1958) (citation omitted).

118. Ajabu v. State, 693 N.E.2d 921, 929 (1998) (citing Boehm v. Town of St. John, 675 N.E.2d 318, 321 (Ind. 1996) (internal quotation marks omitted)).

119. *Id.* at 930 (citing *Town of St. John*, 675 N.E.2d at 321 (internal quotation marks

If a court reaches a conclusion in conflict with any provision of the constitution, such conclusion must fail because the framers of the Indiana Constitution would not have been

> guilty of the folly of inserting therein conflicting or inconsistent provisions. So if it can be sworn that such conclusion renders meaningless a single word or sentence in the constitution it must fall; for it cannot be maintained that any word in an instrument of so much importance as this was not to have a potent meaning.[120]

There may exist a difference of opinion as to the "proper meaning to be given to some of the words or sentences" in the constitution.[121] However, the Indiana Supreme Court reasoned, "some meaning is to be attached to each and every word found therein, and we are not at liberty to attach to any word there found a meaning that will conflict with any other word or sentence, or the well-known intent of the framers of the Constitution."[122]

Article II, section 9 expressly prohibits individuals from holding more than one lucrative office, "except as expressly permitted in this Constitution."[123] This suggests that only through an amendment to the constitution would the legislature be authorized to create an exception. In other sections of the constitution, the framers provided that the legislature could act and pass ordinary law to change the prescription of the constitution by using language in other sections like "as may be prescribed by law"[124] or "may provide by law."[125] The framers realized certain areas needed to remain flexible to adapt to changing circumstances such as creating courts[126] and defining courts' jurisdiction,[127] or collecting taxes and creating exemptions.[128] The framers used the "except as provided in the Constitution" language only one other time in article I, section 25.[129] However, the word "expressly" was left out of article I, section 25 suggesting that a court may be able to interpret an implied power if a situation so dictated. The framers placing "expressly" in no other place but article II, section 9 suggests that they were not open to any legislative exception other than amendment.

However, the legislative authority is vested in the General Assembly, which has the sole power of creating the laws.[130] This power includes the authority to

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omitted)).

120. State *ex rel.* Collett v. Gorby, 23 N.E. 678, 680 (Ind. 1890).

121. *Id.*

122. *Id.*

123. IND. CONST. art. II, § 9.

124. IND. CONST. art. VI, § 3, 8; IND. CONST. art. VII, § 8; IND. CONST. art. X, § 8.

125. IND. CONST. art. II, § 14; IND. CONST. art. IV, § 4; IND. CONST. art. VII, § 1.

126. IND. CONST. art. VII, § 1.

127. IND. CONST. art. VII, § 8.

128. IND. CONST. art. X, § 8.

129. IND. CONST. art. I, § 25.

130. IND. CONST. art. IV, § 1.

create offices.[131] If the legislature can create the offices, it can prescribe the duties and responsibilities for that office. The framers, in giving the law-making authority and office creating power to the legislative department, must have intended for the legislature to be able to create offices as government evolved and to react to the needs and demands of such evolution. The framers would expect the legislature with its all encompassing legislative authority to adapt to government as it became larger and more active. If the legislature chose to allow an individual to hold multiple offices to promote efficiency and enable individuals with expertise to handle multiple tasks, then the framers would have thought that permissible.

Furthermore, the legislature does not have an express prohibition listed in article IV, section 22 against creating exceptions to the dual office prohibition. There is no limitation expressly forbidding the legislature from defining exceptions to the general rule. If the framers had intended the legislature not to make exceptions, it would have been listed in article IV, section 22. In addition, in *State ex rel. Harrison v. Menaugh*, the Indiana Supreme Court agreed with Chief Justice Black's opinion in *Sharpless v. Mayor*:

> The constitution has given us a list of the things which the legislature may not do. If we extend that list, we alter the instrument. We become ourselves the aggressors, and violate both the letter and the spirit of the organic law as grossly as the legislature possibly could. If we can add to the reserved rights of the people, we can take them away. If we can mend, we can mar. If we can remove the landmarks which we find established, we can obliterate them. If we can change the constitution in any particular, there is nothing but our own will to prevent use from demolishing it entirely.[132]

Therefore, the legislative authority having been placed solely in the General Assembly and with no express prohibition against giving the General Assembly the power to make laws to create exceptions to article II, section 9, the General Assembly might have the ability to create such exceptions. An amendment would be necessary to repeal the entire prohibition, but for special exceptions to the general rule, the constitution can be implied to give such power to the legislature.[133]

Nevertheless, the intent of the framers and their purpose for creating article II, section 9 can be inferred from the Constitutional Convention debates. In one debate, the framers argued over exceptions being incorporated into the proposed

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131. *See* State *ex rel.* Yancey v. Hyde, 22 N.E. 644, 649 (Ind. 1889); *see also* IND. CONST. art. XV, § 1 ("All officers, whose appointment is not otherwise provided for in this constitution, shall be chosen in such manner as now is, or hereafter may be, prescribed by law."); Tucker v. State, 35 N.E.2d 270, 285 (Ind. 1941).

132. State *ex rel.* Harrison v. Menaugh, 51 N.E. 117, 120 (Ind. 1898) (citing Sharpless v. Mayor of Philadelphia, 21 Pa. 147, 161 (1853)).

133. IND. CODE § 5-6-4-3 (2003) (appointed deputy of a political subdivision officer or a judicial circuit officer); § 36-8-3-12; § 13-21-3-10(b); § 20-6.1-6-14.

section.[134] As one framer argued, "no matter what the amount of a man's salary may be, let him be content with the one office."[135] The exchange concerned whether exceptions should be added to the amendment and whether there should be a compensation limit. Concern arose over prohibiting all offices from being held by the same office holder, because many of the offices filled are petty offices "filled by individuals for the mere convenience of the public, without much compensation attached to such offices."[136] It was argued that "[t]he design of the committee was not to exclude those men holding these little offices . . . but to leave the door open, inasmuch as many of them were established and kept up more for public convenience than from any profit which they yield."[137] The majority opposed leaving the door open and moved to include the language "office or appointment" into the amendment because they whole-heartedly believed in the principle of "one individual should not hold more than one office at a time."[138] A vocal minority thought that this would carry the prohibition too far by keeping local leaders from serving in the General Assembly. Furthermore, they argued that "unless the offices of clerk, auditor, or recorder, in the smaller counties, were combined and given to one person, they could not get competent persons to fulfil the duties appertaining to them."[139]

However, the majority stood hard and fast to a strict prohibition, except for militia officers, out of the fear of a "man's holding two appointments at the same time, because the duties imposed upon him by one appointment are very apt to interfere with those of the others."[140] An individual speaking for the majority suggested:

> If, sir, you permit one citizen to wield his influence, the patronage, and the very profits of one office, into which he may have been placed by the confidence of the people, to advance what he may deem to be his claim upon the people, or upon his party, for another, you virtually annul the force of a section already adopted, "that all elections shall be free and equal."[141]

At the conclusion of the debate, the majority voted not to include any amendment creating exceptions to article II, section 9. The purpose of the framers would lead to a conclusion that any exceptions would have to be created through a constitutional amendment.

Aside from any constitutional inhibitions or restrictions, "the legislature may be said to be unfettered in the exercise of the power with which it has been

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134. 2 DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1053 (1850).

135. *Id.*

136. *Id.* at 1054.

137. *Id.*

138. *Id.*

139. *Id.* at 1308.

140. *Id.* at 1060.

141. *Id.* at 1310 (emphasis omitted) (citation to quoted phrase not provided in original).

invested."[142] In these situations where it is claimed that the General Assembly has passed legislation allowing a specific lucrative office to hold a second lucrative office, the statute can be said to conflict with the constitution. The Indiana Supreme Court explained that it must give the lawmaking power the benefit of validity because of the "fact that the legislature is invested with plenary power for all purposes of civil government."[143]

For instance, in *Rush v. Carter*, the court explained that if the consideration of the law in this case by the reviewing court were one of constitutional interpretation within the sole context of article II, section 9, which forbids the dual holding of lucrative offices, it may well be that *Rush* could prevail.[144] The court thought that the recent legislation[145] "changing the status of members of a county sheriff's department from the traditional concept of sheriff's deputy into that of a professional police officer, the latter comparing favorably in many respects with the employer-employee relationships associated with municipal police and fire departments and the state police," strengthened the case that no constitutional encroachment occurred.[146] The court looked more at policy and purpose than strict construction when it observed that when a county police officer "sought election to . . . a school board or city council, [Indiana Code section] 36-8-10-11 would sanction the act, and because of separate governmental entities and non-related duties and responsibilities between the two positions the problems attendant to the case at hand should not be present."[147]

Perhaps, article II, section 9 would not receive a construction as broad as its terms might indicate. However, section 9 states that an individual shall not hold more than one lucrative office "except as expressly permitted in this Constitution."[148] Section 9 does not say "as prescribed by law," which would leave greater discretion to the legislature to define exceptions through statutory use. Section 9 specifically states that exceptions must be in the constitution.

Nevertheless, an article II, section 9 conflict with both courts and past Attorney General opinions can be avoided by finding that a lucrative position is not an office.[149] For instance, in *Gaskin*, the court found that like city police officers, deputy marshals are employees of the town. Thus, this section does not

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142. State *ex rel.* Harrison v. Menaugh, 51 N.E. 117, 119 (Ind. 1898) ("This doctrine has been repeatedly affirmed in many of the decisions of this court."). *See* Hovey v. State, 21 N.E. 21 (Ind. 1889); Robinson v. Schenck, 1 N.E. 698 (Ind. 1885); Mount v. State *ex rel.* Richey, 90 Ind. 29 (1883); Lafayette, Muncie, & Bloomington R.R. Co. v. Geiger, 34 Ind. 185 (1870); Beebe v. State, 6 Ind. 501 (1855); Beauchamp v. State, 6 Blackf. 299 (Ind. 1842).

143. *Menaugh*, 51 N.E. at 120.

144. 468 N.E.2d 236, 237-38 (Ind. Ct. App. 1984) (though most courts have disagreed with the application of article III, section 1 in the holding of *Rush*).

145. IND. CODE § 36-8-10-11 (2003).

146. *Rush*, 468 N.E.2d at 237.

147. *Id.* at 237-38.

148. IND. CONST. art. II, § 9.

149. *See* Harden v. Whipker, 646 N.E.2d 727 (Ind. Ct. App. 1995); Gaskin v. Beier, 622 N.E. 2d 524, 524 (Ind. Ct. App. 1993); *see also* Ind. Att'y Gen. Op. 97-1; Ind. Att'y Gen. Op. 83-5.

contravene Indiana Constitution, article II, section 9.[150] The court in *Gaskin* distinguished between other situations and the one in its case explaining, "[u]nlike the marshal, who is appointed by the town legislative body, the deputy marshal is appointed by the marshal."[151] The legislature crafted Indiana Code section 36-4-4-2 so there would be no question as to whether it intruded on article II, section 9. The legislature specifically stated that city employees other than elected or appointed public officers may run for and hold a lucrative office. This prevents any question of the statute from getting bogged down in an analysis of office or employment.

The Attorney General's office has used the *Gaskin* court's framework to determine whether a position is an office in the article II, section 9 analysis. This analysis has allowed the Attorney General's office to avoid having to determine whether a statute conflicts with article II, section 9.[152]

For instance, the Attorney General found that the position of county attorney is not mentioned in the Indiana Code provisions pertaining to the management of county government.[153] The absence of statutory prescription indicates that a county attorney is not charged with a public duty as contemplated by *Gaskin*. The opinion explained that the General Assembly had enacted a statute which provided that an individual employed by a county executive as an attorney does not hold a lucrative office for the purposes of article II, section 9.[154] The Attorney General, in his opinion, was able to avoid commenting on the constitutionality of such statute because article II, section 9 was not in conflict because the position was determined not to be an office.[155] Similarly, the positions of attorney for the board of zoning appeals and attorney for the metropolitan planning commission are not considered "offices" under *Gaskin* because the General Assembly had neither defined these positions nor vested any powers and duties in the positions.[156]

The opinion contrasted the above with the case of a city civil engineer who is appointed by the mayor, in the same manner as a city fire chief and city police chief. Unlike a city fire chief and city police chief, however, a city civil engineer does not have statutorily prescribed duties or powers. The General Assembly has created the position, but has not established any responsibilities. Accordingly, a city civil engineer would not hold an "office" under article II, section 9.[157]

The assault on the dual office prohibition has generally always been direct, with the General Assembly passing a statute creating an exception. In many cases, the General Assembly has chosen to increase the duties of an office to the extent a second office conflict may arise. "[A]n office is not necessarily created

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150. 622 N.E.2d at 524.
151. *Id.* at 528 (citations omitted).
152. *See* Ind. Op. Att'y Gen. 1 (1997).
153. *Id*; *see also* IND. CODE § 36-2 (2003).
154. Ind. Op. Att'y Gen. 1 (1997); *see also* IND. CODE § 36-2-2-30.
155. Ind. Op. Att'y Gen. 1 (1997).
156. *Id.*
157. *Id.*

by a statute that imposes additional duties and powers upon an officer."[158] "Offices created by the Legislature may be abolished by the Legislature. The power that creates can destroy. The creator is greater than the creature. The term of an office may be shortened, the duties of the office increased, and the compensation lessened, by the legislative will."[159]

Because the people elect the General Assembly, the legislative actions should be deemed the will of the people, unless there is a direct conflict of a statute with the constitution. "[T]he great power conferred upon the legislature may be, and sometimes is, abused, but the remedy for this evil lies in an appeal to the people, who, in their sovereign capacity, can correct it, and not by appeal to the judiciary."[160] There is no reason for assuming that the courts should correct the mere abuse by the legislature of its power.[161] If the judiciary should assume to protect the people against the abuse of power upon the part of their own servants or representatives, it would be the equivalent of attempting to protect the people against their own abuse.[162] It is with this bias toward the will of the people that the court could incorporate into the construction of any legislation.[163]

If one of the positions is considered a non-lucrative position because it is has been determined to either be an employee instead of an officer, or there is no compensation making the office not lucrative, or there has been a statutory exemption, then the dual office analysis moves to the next step—article III, section 1. Along with the separation of powers analysis comes the issue of the legislature creating exceptions to a constitutional ban.

III. ANALYSIS—ARTICLE III, SECTION 1

A. In General

Arguments that dual office-holding is prohibited have sometimes been based on constitutional provisions pertaining to separation of governmental powers.[164]

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158. Book v. State Office Bldg. Comm'n, 149 N.E.2d 273, 290 (Ind. 1958); *see also* Ashmore v. Greater Greenville Sewer Dist., 44 S.E.2d 88, 95 (1947) (concluding that the rule enforced with respect to double or dual office holding in violation of the constitution is not applicable to those officers upon whom other duties relating to their respective offices are placed by law).

159. Jeffries v. Rowe, 63 Ind. 592, 594 (1878); *see also* Walker v. Peelle, 18 Ind. 264 (1862); Walker v. Dunham, 17 Ind. 483 (1861); Ellis v. State, 4 Ind. 1 (1852); Gilbert v. Bd. of Comm'rs, 8 Blackf. 81 (Ind. 1846).

160. State *ex rel.* Harrison v. Menaugh, 51 N.E. 117, 120 (Ind. 1898).

161. *Id.*; *see also* State *ex rel.* Terre Haute v. Kolsem, 29 N.E. 595 (Ind. 1891); Brown v. Buzan, 24 Ind. 194 (1865).

162. *Harrison*, 51 N.E. at 120.

163. *See Book*, 149 N.E.2d at 280 (determining that the statute is presumptively valid and will not be overthrown as unconstitutional if it can be sustained on any reasonable basis; it is the duty of courts to uphold Acts of the Legislature if it is possible to do so within rules of law; and where there is a doubt as to the constitutionality of a statute, it must be upheld).

164. Gaskin v. Beier, 622 N.E.2d 524, 524 (Ind. Ct. App. 1993) (holding that such provision

Article III, section 1 of the Indiana Constitution states: "The powers of the Government are divided into three separate departments; the Legislative, the Executive including the Administrative, and the Judicial; and no person charged with official duties under one of these departments, shall exercise any of the functions of another, except as in this Constitution expressly provided."[165]

The separation of powers doctrine serves to rid each of the separate departments of state government from any control or influence by either of the other state government departments.[166] "If persons charged with official duties in one [state government] department may be employed to perform duties, official or otherwise, in another department the door is opened to influence and control by the employing department."[167] "[I]t is obvious that the purpose of all these separation of powers provisions of Federal and State Constitutions is to rid each of the separate departments of government from any control or influence by either of the other departments."[168] Thus, even if a person is not a dual office holder, if that person is executing functions of public office in more than one state government department, that person violates the separation of powers doctrine.[169] The objective of the separation of powers doctrine is fundamental and basic, "namely, to preclude a commingling of these essentially different powers of government in the same hands . . . in the sense that the acts of each [department] shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments."[170]

For instance, in *Book v. State Office Building Commission*,[171] there was a taxpayer's action to enjoin members of the Commission from proceeding further with the construction of a State Office Building.[172] The membership of the Commission included the Governor, the Lieutenant Governor, the members of

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was not violated by an individual's simultaneous service as a town deputy marshal and a town council member, the constitutional article in question related only to the state government, and officers were charged with duties under one of the separate departments of the state and not to municipal governments and officers).

165. IND. CONST. art. III, § 1.

166. Schloer v. Moran, 482 N.E.2d 460, 463 (Ind. 1985); Black v. Burch, 80 N.E.2d 294, 300-03 (Ind. 1948); State *ex rel.* Phelps v. Sybinsky, 736 N.E.2d 809, 815 (Ind. Ct. App. 2000).

167. *Black*, 80 N.E.2d at 302.

168. *Id.*

169. *See* 83-5 Ind. Op. Att'y Gen. No. 24 (1983).

170. *Black*, 80 N.E.2d at 300 (quoting O'Donoghue v. United States, 289 U.S. 516, 530 (1933)) (emphasis omitted).

171. 149 N.E.2d 273 (Ind. 1958).

172. *Id.* The court described the duties of the State Office Building Commission as follows:

> [T]o acquire a site within the City of Indianapolis, Indiana, and to construct and erect thereon with all necessary equipment, a State Office Building suitable and adequate to house the offices of the various departments and agencies of the State Government . . . [and] to enter into appropriate agreements with the various State departments and agencies for the use and occupancy of such building.

Id. at 279.

the State Budget Committee, one member of the Senate appointed by the Lieutenant Governor, and one member of the House appointed by the Speaker. Because all the members of the State Budget Committee except the Budget Director were also members of the General Assembly, legislators constituted a majority of the Commission. The legislation creating the Commission was challenged as violating various provisions of the Indiana Constitution, including the dual office holding provision[173] and the separation of power clause.[174] The Indiana Supreme Court rejected the claim of unconstitutional dual office holding because the provision applies to "lucrative" offices and the Commissioners received only reimbursement of expenses. But the court held that the presence of legislators on a commission with executive administrative duties violated separation of powers.[175]

"The three departments of government are separate and distinct, officers of one department may not properly perform functions which have been assigned by law to another department."[176]

> Article 3, [section] 1 is not a law against dual office holding. It is not necessary to constitute a violation of the Article, that a person should hold an office in two departments of Government. It is sufficient if he is an officer in one department and at the same time is performing functions belonging to another.[177]

It is interesting to note that when article III, section 1 of the Indiana Constitution was reported in its original form by the committee on miscellaneous provisions on January 21, 1851, the word "power" was contained therein instead of the word "functions."[178] Though the two words are almost interchangeable, the term "functions" indicates a broader field of activities than the word "power."[179]

The Indiana Supreme Court determined that it was obvious that "the purpose of all these separation of powers provisions of Federal and State Constitutions is to rid each of the separate departments of government from any control or influence by either of the other departments."[180] The court explained, "this object can be obtained only if [article III, section 1] of the Indiana Constitution is read exactly as it is written."[181] In *Black*, the court determined that four legislators who received appointments to boards and commissions in the executive branch were not public officers but mere "employees" who, therefore,

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173. IND. CONST. art. II, § 9.

174. IND. CONST. art. III, § 1.

175. *Book*, 149 N.E.2d at 273.

176. Parker v. State, 35 N.E. 179, 180 (Ind. 1893); *see also* State *ex rel.* Hovey v. Noble, 21 N.E. 244, 246 (Ind. 1888).

177. *Book*, 149 N.E.2d at 296.

178. KETTLEBOROUGH, *supra* note 3, at 732.

179. 7 Ind. Op. Att'y Gen. 30 (1961) (citing State *ex rel.* Black v. Burch, 80 N.E.2d 294, 302 (Ind. 1948)).

180. *Black*, 80 N.E.2d at 302.

181. *Id.*

did not violate article II, section 9.[182] However, the court determined that the legislators could not be charged with official duties in the legislative branch while employed to perform duties in either the executive or judicial branch pursuant to article III, section 1. The court explained that "[i]f persons charged with official duties in one department may be employed to perform duties . . . in another department the door is opened to influence and control by the employing department."[183]

Likewise, the Attorney General followed the court's reasoning in *Black* when it was faced with the issue of an elected state senator who also served as an investigator in the prosecutor's office.[184] The Attorney General reasoned that an investigator is "an employee of an officer" and, therefore, is not prohibited by article II, section 9.[185] However, a member of the Indiana General Assembly belongs to the legislative department, and the position of an investigator falls under the judicial department. Therefore, the Attorney General determined that such a dual holding would be in violation of the Indiana Constitution article III, section 1 as construed in *State ex rel. Black v. Burch*.[186]

Article III, section 1 attaches "only to the state government and officers charged with duties under one of the separate departments of the state and not to municipal governments and officers."[187] Therefore, the separation of powers doctrine has no application at the local level.[188] Consistent with this theory, Indiana Code section 36-4-4-2 prohibits a person from simultaneously holding office in both the executive and legislative branch of a city government, but does not speak to office holding on the state level.[189] Therefore, neither article III, section 1 of the Indiana Constitution nor Indiana Code section 36-4-4-2 prohibits a person from holding an office in one department of state government and another office in a branch of municipal government. Article III relates "only to the state government and officers charged with duties under one of the separate departments of the state and not to municipal governments and officers."[190] "The office of city councilman is 'purely and wholly municipal' in character. A city councilman has no duties under the general laws of the state."[191] However, in

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182. *Id.* at 299.

183. *Id.* at 302.

184. 7 Ind. Op. Att'y Gen. 30 (1961).

185. *Id.*

186. 80 N.E.2d at 37; *see also* 18 Ind. Op. Att'y. Gen. 66 (1981) (stating that the Indiana General Assembly membership and Indiana state teachers' retirement fund board of trustees membership are under separate departments of state government and the simultaneous holding of the two positions would violate article III, section 1).

187. Gaskin v. Beier, 622 N.E.2d 524, 529 (Ind. Ct. App. 1993).

188. Willsey v. Newlon, 316 N.E.2d 390, 391 (Ind. App. 1974). *See also* Sarlls v. State *ex rel.* Trimble, 166 N.E. 270, 270 (Ind. 1929); Bradley v. City of New Castle, 730 N.E.2d 771, 780 (Ind. Ct. App. 2000).

189. IND. CODE § 36-4-4-2 (2003).

190. *Gaskin*, 622 N.E.2d at 529.

191. State v. Kirk, 44 Ind. 401 (1873).

Rush v. Carter, the court concluded that the "contemporaneous holding by the same person of positions on the county council and as a county policeman is violative of this constitutional provision."[192] The court reasoned that "[b]ecause a county is an involuntary political or civil division of the state government . . . Rush is bound by that constitutional provision in the same manner as state employees."[193] The court noted that article III, section 1 is strictly construed.[194] To strengthen its opinion, the court cited the Indiana Supreme Court in *State ex rel. Black v. Burch*, explaining that "[t]he object of the separation of powers is to preclude a commingling of three essentially different powers in the same hands in the sense that the acts of each shall never be controlled by or subjected directly or indirectly to the coercive influence of either of the others."[195] The court applied this reasoning by suggesting that Rush as a council member would have some degree of fiscal control over Rush the county policeman and the rest of the county police department, and this overlapping control was prohibited by the holding of *Black*.[196]

Nevertheless, it has long been held in case law by the Indiana Supreme Court that the separation of powers doctrine, article III, section 1, relates only to state government and officers charged with duties under one of the separate departments of the state and not to municipal governments and officers.[197] In *Gaskin*,[198] the court distinguished *Rush* by focusing on its reliance on *Applegate v. State ex rel Pettijohn*[199] in determining that Gaskin having been elected to the board of trustees while serving as deputy marshal was not a violation of article III, section 1. The court pointed out that *Applegate* was a "mandamus action brought by the state to compel the Hamilton County Auditor to issue payment to the County Deputy treasurer for payment for her services."[200] The *Applegate* court explained that the county officers authority is limited to that granted by the

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192. 468 N.E.2d 236, 238 (Ind. Ct. App. 1984).

193. *Id.*

194. *Id.* (citing Warren v. Ind. Tel. Co., 26 N.E.2d 399 (Ind. 1940)).

195. *Id.* (citing State *ex rel.* Black v. Burch, 80 N.E.2d 294, 300 (Ind. 1948)).

196. *Id.*

197. State v. Monfort, 723 N.E.2d 407, 414 (Ind. 2000) ("There is authority for the proposition that the separation of powers doctrine applies only to state government and its officers, not municipal or local governments."); *see also* Willsey v. Newlon, 316 N.E.2d 390 (Ind. 1974); Mogilner v. Metro. Plan Comm'n of Marion County, 140 N.E.2d 220 (Ind. 1957) (explaining that the metropolitan plan commission falls within the category of municipal governments, and therefore, article III, section 1 is not applicable); State *ex rel.* Buttz v. Marion Circuit Court, 72 N.E.2d 225, 230 (Ind. 1947); Sarlls v. State *ex rel.* Trimble, 166 N.E. 270 (Ind. 1929); Livengood v. City of Covington, 144 N.E. 416 (Ind. 1924); Baltimore & O.R. Co. v. Town of Whiting, 68 N.E. 266 (Ind. 1903); Gaskin v. Beier, 622 N.E.2d 524, 529 (Ind. Ct. App. 1993); *Rush*, 468 N.E.2d at 236.

198. 622 N.E.2d at 529 n.3.

199. 185 N.E. 911 (Ind. 1933).

200. *Gaskin*, 622 N.E.2d at 529 n.3 (citing *Applegate*, 185 N.E. at 912).

legislature because the "[c]ounties are but subdivisions of the state."[201] Therefore, because the auditor had not been authorized to pay the deputy treasurer out of public funds, the auditor could not be forced to pay the deputy treasurer out of public funds.[202] The court decided not to follow *Rush* because *Applegate* did not arise in the context of an article III, section 1 challenge and because of the line of authority that article III, section 1 applies only to state government offices.[203]

Likewise, the Attorney General has followed the Indiana Supreme Court's opinion that article III, section 1 does not apply to municipalities. The Attorney General determined that a local library district is basically a political subdivision of the state as municipalities are political subdivisions of the state.[204] The term is applied to cities and towns as distinguished from separate departments of state government. Therefore, the library board members do not come within the purview of article III, section 1.[205]

B. Safeguard to Legislative Encroachment on the Constitution

Article III, section 1 of the Indiana Constitution is the "'keystone of our form of government and to maintain the division of powers as provided therein, its provisions will be strictly construed.'"[206] "'The true interpretation of this [separation of powers] is, that any one department of the government may not be controlled or even embarrassed by another department, unless so ordained in the Constitution.'"[207]

"Notwithstanding the general prohibition against interference by one branch in the functions allotted to another, some powers that arguably constitute that interference are expressly conferred by the Constitution. If so, the specific grant is . . . 'ordained in the Constitution.'"[208] Therefore, the courts concluded that the explicit language in article VII, section 1 provides that "the power to create and abolish courts is among the powers given to the legislative branch."[209] But the court explained that though within the limits of the constitution, for the legislature to abolish a court "in the middle of a judge's term violates the separation of powers provision of the Indiana Constitution."[210] The court concluded that there must be an "'absolute integrity and freedom of action of

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201. *Applegate*, 185 N.E. at 912.

202. *Id.*

203. *Id.*

204. 45 Ind. Op. Att'y Gen. 260-61 (1960).

205. *Id*; *see also* 1960 Ind. Op. Att'y Gen. No. 34.

206. State v. Monfort, 723 N.E.2d 407, 411 (Ind. 2000) (quoting Book v. State Office Bldg. Comm'n, 149 N.E.2d 273, 293 (Ind. 1958)).

207. *Id.* (quoting *In re* Judicial Interpretation of 1975 Senate Enrolled Act No. 441, 332 N.E.2d 97, 98 (Ind. 1975)) (alteration in original).

208. *Id.* (quoting *In re* Senate Act 441, 332 N.E.2d 97, 98 (Ind. 1975)).

209. *Id.*

210. *Id.*

courts.'"[211]

Courts must weigh in to ensure that one branch of government is not influencing or controlling another. Therefore, article III, section 1 is a safeguard for situations where an action taken might be constitutional, but, because of the effect on another branch of government, the action violates article III, section 1 and becomes unconstitutional. For instance, in *State ex rel. Black v. Burch*, the Indiana Supreme Court held that the employment of four members of the General Assembly as employees, not officers, was not a violation of article II, section 9, but was a violation of article III, section 1 because the word "functions" as used in the Constitution includes "duties, official or otherwise, in another department."[212]

In *Rush v. Carter*, the court suggested that article II, section 9 did not apply because Rush was considered an employee not an officer, but that article III, section 1 did. The court reasoned that the encroachment of the constitution "under the facts of this case is that Rush as a county council member (a member of the legislative branch) would have, in some degree, fiscal control over, Rush the county policeman (a member of the executive branch) as well as the rest of the county police department."[213] The court explained that the holding of *State ex rel. Black v. Burch* was directed to resolve this type of situation.[214]

The Indiana Supreme Court found that the holding of *Rush* could be distinguished from the facts in *In re Tina T.*[215] In *In re Tina T.*, it was claimed that the local coordinating committee ("LCC") statute violates the separation of powers doctrine because the director of the county welfare department, a member of the executive branch of government, is one of the voting members of the LCC.[216] The court reasoned that in *Rush*, as a member of the county council, Rush would have been able to exercise actual decision-making power as a member of a body.[217] The court continued by suggesting that *Rush* "could have influenced the other council members such that actions taken by that body accrued to his own personal benefit or to the benefit of his department of the executive branch of government and to the detriment of other departments."[218] However, the LCC in *In re Tina T.* has no decision-making power and "is authorized only to make a recommendation to the juvenile court, which the court is obligated only to consider."[219] Therefore, the court could not find "the kind of coercive influence which the *Rush* Court warned against."[220]

The representation form of government could be jeopardized by allowing the

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211. *Id.* (quoting Bd. of Comm'rs v. Albright, 81 N.E. 578, 582-83 (Ind. 1907)).
212. 80 N.E.2d 294, 302 (Ind. 1948).
213. Rush v. Carter, 468 N.E.2d 294, 238 (Ind. Ct. App. 1984).
214. *Id.*
215. 579 N.E.2d 48 (Ind. 1991).
216. *Id.* at 59.
217. *Id.* at 60.
218. *Id.*
219. *Id.*
220. *Id.*

application of article II, section 9 to be controlled by only the will of the people. The electorate might not be informed or have knowledge of the effect and harm of the legislature providing exceptions to the constitution. Therefore, the courts must use article III, section 1 to insure that any abuse or unchecked influence does not upset the separation of power within the government.

The fact that a proposed dual office holding does not violate the constitutional provisions construed above does not finally determine whether that dual office holding is permissible. It is necessary to consider additional tests, including public policy, incompatibility, or conflict of interests between the two offices.[221]

VI. CONFLICT OF INTEREST OR AGAINST PUBLIC POLICY

The fact that a proposed dual office holding does not violate constitutional provisions does not determine finally whether an office holding is permissible. It is necessary to consider additional tests, including public policy, incompatibility, or conflict of interests between the two offices.[222] A person cannot serve in more than one public service position if the positions are incompatible with each other in that they create a conflict of interest or go against public policy, or if local ordinances or regulations prohibit such multiple position holding. Generally, a public officer is prohibited from holding two incompatible offices at the same time.

Two rules are generally recognized concerning when incompatibility has become an issue independent of statutory or constitutional provisions. First, "incompatibility does not depend upon the incidents of the offices, as upon physical inability to be engaged in the duties of both at the same time."[223] Second, offices are generally held to be incompatible where a conflict of interests exists, "as where one office is subordinate to the other [office], and subject in some degree, to its revisory power; or where the functions of the two offices are inherently inconsistent and repugnant."[224] "In such cases it has uniformly been held that the same person cannot hold both offices."[225] "When such incompatibility exists, the acceptance of the latter office vacates the first office."[226]

The Michigan Supreme Court explained:

> "It is extremely difficult to law [sic] down any clear and comprehensive rule as to what constitutes incompatibility of offices. . . . Sometimes it is said that incompatibility exists where the nature and duties of the two

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221. *See* 30 Ind. Op. Att'y Gen. 173 (1961); *see also* 45 Ind. Op. Att'y Gen. 255 (1960).

222. *See* 30 Ind. Op. Att'y Gen. 173 (1961).

223. State *ex rel.* Metcalf v. Goff, 9 A. 226 (R.I. 1887).

224. *Id.* at 227; *see* 11 Ind. Op. Att'y Gen. 58 (1967); 70 Ind. Op. Att'y Gen. 258 (1954); 77 Ind. Op. Att'y Gen. 234 (1951); *see also* Schloer v. Moran, 482 N.E.2d 460, 464 (Ind. 1985); Wells v. State *ex rel.* Peden, 94 N.E. 321, 323 (Ind. 1911).

225. *See Goff*, 9 A. at 227.

226. 70 Ind. Op. Att'y Gen. 258 (1954).

> offices are such as to render it improper, from considerations of public policy, for one incumbent to retain both. . . . It is not an essential element of incompatibility at common law that a clash of duty should exist in all, or in the greater part, of the official functions. . . .
>
> One of the most important tests as to whether offices are incompatible is found in the principal that the incompatibility is recognized whenever one is subordinate to the other in some of its important and principal duties, or is subject to supervision by the other, or where a contrariety and antagonism would result in the attempt by one person to discharge the duties of both."[227]

Considerations of public policy can render it improper for an incumbent to retain two offices if that person may not be able to impartially and efficiently perform the duties of both offices.[228] "Two offices or positions are incompatible if there are many potential conflicts of interest between the two, such as salary negotiations, supervision and control of duties, and obligations to the public to exercise independent judgment."[229] "Incompatibility of office or position involves a conflict of duties between two offices or positions."[230] "While this conflict of duties is also a conflict of interest, a conflict of interest can exist when only one office or position is involved, the conflict being between that office or position and a nongovernmental interest."[231]

"An incompatibility exists whenever the statutory functions and duties of the offices conflict or require the officer to choose one obligation over another. If this is the governmental scheme, incompatibility must be found even though in practice a conflict of duty might never arise."[232]

For instance, in *Wells v. State ex rel. Peden*,[233] the court compared whether the duties of deputy county auditor and trustee of the school of a town are incompatible. The court cited "several particulars in which the duties are incompatible."[234] The court explained that the auditor and his deputy apportion the school revenue and approve the bonds of school trustees. The school trustee, on the other hand, makes certain tax levies, while the auditor makes assessments and computes the taxes. The auditor or his deputy apportions and disburses certain school funds and the trustees receive them. The court held that "[t]here is such a connection between the two offices with respect to the school funds that leads to such incompatibility with respect to their management, and the

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227. *See* Weza v. Auditor General, 298 N.W. 368, 369 (Mich. 1941) (quoting 22 R.C.L. §§ 55, 56).

228. 63C AM. JUR. 2D PUBLIC OFFICERS AND EMPLOYEES § 58 (2003).

229. *Id.*

230. *Id.* § 60.

231. *Id.*

232. *Id.* § 58.

233. 94 N.E. 321, 323 (Ind. 1911).

234. *Id.*

supervision of one [office] over the other, that the acceptance of one is the vacation of the other."[235]

A conflict of interest can also be a crime. When a public servant violates the provisions of Indiana Code section 35-44-1-3, that person commits conflict of interest, which is a Class D felony.[236] Further, even if there is no injury or actual benefit from the conflict of interest, the law does not "permit public servants to place themselves in a situation where they may be tempted to do wrong."[237] To deter conflict of interest the courts hold all such conflicting employment void.[238]

Whether these final considerations are violated will differ with each fact situation. Also, there may or may not be any local ordinances or regulations that govern whether a particular public servant may serve in another public service position. The public servant's appointing authority determines whether such positions are incompatible with each other in that they either create a conflict of interest or violate public policy.[239] The appointing authority, being in full possession of the relevant facts and more knowledgeable regarding the specific duties of the office, is generally in a better position to make this determination.[240]

Public policy is determined from a consideration of the constitution, statutes, practice of the state's administrative officers, and the decisions of the Indiana Supreme Court.[241] Courts have recognized that the "[L]egislature is the arbiter of public policy" and as such, deference should be given to the statutes passed by the legislature.[242] These statutes serve as "clear statement[s] of public policy . . . which [courts] are constrained to follow."[243] Alternatively, deference should be granted to the appointing authority, the individual most likely to have the factual knowledge necessary to make an informed decision as to whether public policy as expressed in constitutional provisions and various statutory prohibitions would be violated if dual offices are held by one individual.[244]

Past Attorney General opinions decline to answer these final questions for the appointing authority absent blatant conflicts of interest or violations of public policy.[245] For example, the Attorney General issued an opinion responding to an inquiry as to whether a member of the Marion County Plan Commission could continue to serve and be compensated once elected to the Indiana House of

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235. *Id.*

236. IND. CODE § 35-44-1-3 (2003).

237. Cheney v. Unroe, 77 N.E. 1041, 1043 (Ind. 1906); *see also* 3 Op. Att'y Gen. *1 (1989).

238. *Cheney*, 77 N.E. at 1044; Pipe Creek Sch. Township v. Hawkins, 97 N.E. 936, 937 (Ind. App. 1912).

239. *See* Gaskin v. Beier, 622 N.E.2d 524, 530 (Ind. Ct. App. 1993).

240. 11 Ind. Op. Att'y Gen. 58 (1967); 33 Ind. Op. Att'y Gen. 228 (1966).

241. *See* Hogston v. Bell, 112 N.E. 883, 886 (Ind. 1916).

242. *Gaskin*, 622 N.E.2d at 530.

243. *Id.*

244. *See* 11 Ind. Op. Att'y Gen. 58 (1967); 56 Ind. Op. Att'y Gen. 304 (1964).

245. *See* 3 Ind. Op. Att'y Gen. *1 (1989); 1987-88 Ind. Op. Att'y Gen. No. 87-3; 11 Ind. Op. Att'y Gen. 58 (1967); 4 Ind. Op. Att'y Gen. 20 (1961); 9 Ind. Op. Att'y Gen. 42 (1960); Ind. Op. Att'y Gen. 412 (1936).

Representatives.[246] The Attorney General answered that this dual office holding would be a violation of article II, section 9. Furthermore, though a member elected to not be compensated to avoid violation of a "lucrative" office finding under article II, section 9, the two offices are still incompatible.[247] The Attorney General determined that the office of a member of a County Plan Commission is "clearly subordinate to the office of a member of the General Assembly in its importance and principal duties and is subject to supervision by the latter."[248]

In another opinion, the Attorney General responded to an inquiry as to whether a mayor could also serve in a salaried administrative position as the physical education and athletic co-coordinator.[249] The mayor of the second-class city appointed most of the school board members. The opinion concluded, "persons appointed by the mayor as mayor are under his control and would make decisions in relation to the mayor as a school employee concerning his duties, salary, performance, and discharge. A clearer case of incompatibility cannot readily be imagined."[250] Nevertheless, generally the appointing authority having all of the factual knowledge is in a better position to judge whether the public policy as expressed in the constitutional provisions discussed above, and the various statutory prohibitions against public officers having a private interest in the results of their official acts would be violated.[251]

VII. REMEDIES

A. Consequence of Accepting a Second Office

The only enforcement for a claim of dual office holding is a legal challenge in a local court. Indiana courts have held that if a state office holder accepts a second lucrative state office this automatically vacates the first office as a matter of law.[252] Thus, the first office becomes vacant and a successor will need to be appointed or elected, depending on the law applicable to the office.

> [T]he act of accepting . . . the second office, operates as a surrender of the first; and when the officer has been once inducted, under his election or appointment into the second office, his subsequent resignation of the latter can in no manner serve to restore his right of title to the first office.[253]

Also, if a person unlawfully holds or exercises a public office in Indiana, or

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246. 70 Ind. Op. Att'y Gen. No. 258 (1954).

247. *Id.*

248. *Id.*

249. 22 Ind. Op. Att'y Gen. 140 (1967).

250. *Id.*

251. *See* 11 Ind. Op. Att'y Gen. 58 (1967).

252. Chambers v. State *ex rel.* Barnard, 26 N.E. 893 (Ind. 1891); *see also* 30 Ind. Op. Att'y Gen. 142 (1947); Ind. Op. Att'y Gen. 270 (1938).

253. *See* Bishop v. State *ex rel.* Griner, 48 N.E. 1038, 1041 (Ind. 1898).

if a public officer does an act, such as accept another lucrative office, which works to forfeit the officer's office, then a court may determine another person's right to hold the office.[254] In such a case, the plaintiff must demonstrate personal interest in right or title to the office.[255] Indiana Code section 34-17-1-1 provides that information may be filed against a person unlawfully holding a public office. The information may be filed by a prosecuting attorney within his or her respective jurisdiction or by any other person who claims an interest in the office.[256] A "*[q]uo warranto* is the proper remedy for determination of the right of a party to hold office."[257]

As a result of such a court determination, a de facto office holder (the officer who was found to have wrongly held the office) may be ordered to leave office and a de jure office holder (the rightful office holder) will be named to hold office.[258] However, the de facto officer's acts performed before being ousted from office are valid because, as a public policy, the courts have determined that the public should not suffer from the acts of an officer who may have had a defective title or no title at all.[259]

In the event of a conflict of interest, Indiana Code section 35-44-1-3 provides that "a public servant who knowingly or intentionally has a pecuniary interest in, or derives a profit from a contract or purchase connected with an action by the governmental entity served by the public servant commits conflict of interest, a Class D felony."[260] Indiana Code section 35-44-1-3 does not prohibit a public servant from having a pecuniary interest in or deriving a profit from a contract or purchase connected with the governmental entity he serves if (1) he is not a member of or on the staff of the governing unit empowered to contract or purchase on behalf of the government entity; (2) the functions and duties he performs for the governmental entity are unrelated to the contract or purchase and; (3) he fully discloses his interest or profit to the governmental entity he serves.[261]

Under Indiana Code section 35-44-1-3 a "disclosure" does not in itself "permit a public servant to have a percuniary interest in or derive a profit from a contract or purchase connected with a governmental entity."[262] In an opinion by the Attorney General, several factors were listed to take into consideration when determining whether a percuniary interest is permissible: "the position of the elected official, the nature of the governmental entity, the type of contract and the federal and state constitutions, statutes, rules and regulations as well as

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254. IND. CODE § 34-17-1-1 (2003).
255. Brenner v. Powers, 584 N.E.2d 569, 576 (Ind. Ct. App. 1992).
256. *See* IND. CODE § 34-17-2-1 (2003).
257. State *ex rel.* Brown v. Circuit Court of Marion County, 430 N.E.2d 786, 787 (Ind. 1982).
258. State *ex rel.* Bishop v. Crowe, 50 N.E. 471, 473-74 (Ind. 1898).
259. *Id.* at 474; State v. Sutherlin, 75 N.E. 642, 646 (Ind. 1905).
260. IND. CODE § 35-44-1-3 (2003).
261. *Id.* § 35-44-1-3(c)(1).
262. 3 Ind. Op. Att'y Gen. *1 (1989).

common law and codes of ethics."[263]

"In Indiana the Attorney General is a statutory officer, exercising only the authority granted by statute, whereas the office of prosecuting attorney is a constitutional office, carved out of the office of the Attorney General as it existed at common law."[264] Therefore, prosecuting attorneys, within their respective jurisdictions, conduct all prosecutions for conflict of interest.[265]

In *State ex rel. Steers v. Holovachka,* the court found that though the Attorney General does not have the responsibility of conducting all prosecutions, it reversed the lower court's ruling dismissing the Attorney General's request for a special prosecutor.[266] The court found that contracts were "public contracts"[267] within statutes that prohibited any person holding lucrative office under state law from being interested in any contract for public works.[268] The court reasoned that public officers are "prohibited by law from receiving any percentage or profit or money whatever on, or being interested directly or indirectly in public contracts passed upon and entered into under their jurisdiction and authority."[269]

Furthermore, the law of Indiana states "where a statute makes it a crime for a public officer to do a certain act, any contract made in violation thereof is absolutely void, as against public policy."[270] In *Hawkins*, a township advisory board member held a lucrative office position and would violate the conflict of interest statute by having an interest, direct or indirect, in any contract where the township was concerned. A contract between a township advisory board member and the board contrary to the statute would be void.[271]

However, an Attorney General opinion explained that a county surveyor could, if he was a registered engineer or surveyor, accept contracts in his individual capacity and charge for his services, provided that there was no breach or conflict with official duty, or violation of public policy statute.[272] The Attorney General quoted *Noble v. Davison*,[273] where the court said:

> Even in the absence of the statute, the contract would, as appellee maintains, be void, because contrary to public policy. . . . This court has ever steadfastly adhered to the rule which invalidates all agreements injurious to the public, or against the public good, or which have a tendency to injure the public. Contracts belonging to this class are held

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263. 3 Ind. Op. Att'y Gen. * 1 (1989) (internal citation omitted).

264. State *ex rel.* Steers v. Holovachka, 142 N.E.2d 593, 602 (Ind. 1957) (citation omitted); *see also* IND. CODE § 33-14-1-4 (2003).

265. IND. CODE § 33-14-1-4 (2003).

266. 142 N.E.2d at 603.

267. IND. CODE § 10-3713 (1956), repealed; *see id.* § 35-44-1-3.

268. *Holovachka*, 142 N.E.2d at 599-600.

269. *Id.* at 601.

270. Pipe Creek Sch. Township v. Hawkins, 97 N.E. 936, 937 (Ind. 1912) (citation omitted).

271. *Id.*

272. 38 Ind. Op. Att'y Gen. 169 (1957).

273. 96 N.E. 325 (Ind. 1912).

> void, even though no injury results. The test of the validity of such agreements is the tendency to public injury, regardless of the actual intent of the parties, and regardless of actual results.[274]

Using the rationale of *Noble*, the Attorney General concluded that a county surveyor was not required to turn over to the county fees that he earned as a private surveyor during his tenure as county surveyor.[275] The opinion reasoned that those contracts would not be voided where contracting to do legal surveys in counties other than the one where he was elected County Surveyor did not interfere with his official duties.[276] However, for the legal surveys within the surveyor's own county not to be void because of a conflict would depend on whether those surveys interfere with his official duties.[277] Furthermore, it also must be determined whether the surveys are of the same nature as official duties imposed on him by statute.[278]

Where a person held the office of township trustee and accepted appointment as United States Marshal, his office of township trustee was automatically vacated.[279] Further, in such situations where a position is automatically vacated, the official who has the authority to appoint the person to a second office must decide whether such dual office holding would create a conflict of interest or violate public policy.[280]

Finally, when an office holder runs for another office, he or she should take notice of the Hatch Act found in 5 U.S.C. §§ 1501-1508. The Act proscribes the following activity:

> A state or local officer or employee may not (1) use his official authority or influence for the purpose of interfering with or affecting the result of an election or a nomination for office; (2) directly or indirectly coerce, attempt to coerce, command, or advise a State or local officer or employee to pay, lend, or contribute anything of value to a party, committee, organization, agency, or person for political purposes; or (3) be a candidate for elective office.[281]

The Hatch Act restricts the political activity of people employed by state, county, or municipal executive agencies that are affiliated with programs financed in whole or in part by federal loans or grants. However, the Hatch Act does not restrict the political activity of people employed by research or educational institutions, agencies that receive financial support in whole or in part by states or their political subdivisions, or religious, philanthropic, or cultural

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274. 38 Ind. Op. Att'y Gen. 169 (1957) (quoting *Noble*, 96 N.E. at 325).
275. *Id.*
276. *Id.*
277. *Id.*
278. 38 Ind. Op. Att'y Gen. 169 (1957).
279. Ind. Op. Att'y Gen. 333 (1935).
280. 33 Ind. Op. Att'y Gen. 228 (1966).
281. 5 U.S.C. § 1502(a) (2003).

organizations.[282]

Further, 5 U.S.C. § 1502(a)(3) does not apply to (1) the Governor or Lieutenant Governor of a State or an individual authorized by law to act as Governor; (2) the mayor of a city; (3) a duly elected official of an executive department of a state or municipality who is not classified under a State or municipal merit or civil-service system; or (4) an individual holding elective office.

If an officer or employee violates the Hatch Act, the Merit Systems Protection Board may determine that the violation requires the officer or employee to be removed from his or her office or employment.[283] Within thirty days of notice of this decision, the officer or employee must be removed from office or employment.[284] If removal does not occur, the Board may order the withholding of federal loans or grants from the agency that received notice.[285] The withheld amount is equal to two years pay at the rate that the office or employee was receiving at the time of the violation.[286] Further, the officer or employee may not be appointed within eighteen months of his or her removal from an office or employment within the same State to a State or local agency which does not receive loans or grants from a federal agency.[287] If such an appointment does not occur, the Board may order the withholding be made from that State or local agency.[288]

B. The Correct Procedure to Determine the Right to an Office

"[T]he information is the proper remedy to try the title and determine the right to an office, and to oust an intruder for ineligibility, abandonment, or forfeiture."[289] Any person who claims an interest in an office could file an information on his own relation to obtain possession of the office.[290] The prosecuting attorney in the respective county may also file an information when it is determined either to be part of his duty or when directed.[291] A person without any interest in a public office except with the same interest as the general public, and who had no special interest, could not file an information to try the title to an officer or to oust officers.[292]

When filing an information, the content of such filing must include "a plain

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282. *See id.* §§ 1501-1508.

283. *Id.* § 1505.

284. *Id.* § 1506(a)(1).

285. *Id.* § 1506(a)(2).

286. *Id.*

287. *Id.*

288. *Id.*

289. *See* Wells v. State *ex rel.* Peden, 94 N.E. 321, 322 (Ind. 1911) (citations omitted).

290. *Id.*; *see also* IND. CODE § 34-17-2-1 (2003).

291. IND. CODE § 34-17-2-1 (2003).

292. State *ex rel.* Brown v. Circuit Court of Marion County, 430 N.E.2d 786, 787 (Ind. 1982); *see also* State *ex rel.* Antrim v. Reardon, 68 N.E. 169 (Ind. 1903).

statement of the facts that constitute the grounds of the proceeding, addressed to the court."[293] In *State ex rel. Bishop v. Crowe*, an allegation in a complaint of a *quo warranto* proceeding to remove the defendant from office alleged that a relator was eligible for office.[294] The court held that the complaint was sufficient without setting out the plaintiff's qualifications and without pleading any of the evidentiary facts constituting eligibility.[295] The information only had to show that the office held by the defendant was the same office claimed by the relator.[296] However, Indiana Code section 34-17-2-6 states that a prosecuting attorney "shall also set forth the name of the person rightfully entitled to the office, if any, with an averment: (1) of the person's right to the office; or (2) that no person is entitled to the office and that a vacancy in the office will result."[297] A prosecuting attorney that files an information to try the title of an office need only have included the name of the person entitled to the office with a statement of the facts. Whereas, if a person claiming the office filed the information, the facts had to be stated showing his title to the office and his eligibility to hold the office.[298]

A person who claims to be the person entitled to hold the office that wins a judgment can begin exercising the functions of the office.[299] The court has the authority to order the defendant to hand over all funds and records that belong to the office to the person who wins the judgment.[300] For instance, in *Cadwell v. Teaney*, the court ordered the ouster of city officials who refused to leave office despite the election of new individuals.[301] The court also ordered that all the books and papers of the officials being ousted be given to the new electees.[302] The court has this discretion through Indiana Code section 34-17-3-2.

CONCLUSION

Year after year the Attorney General's office receives numerous questions regarding dual office holding. The concerns over fear of corruption in government as well as a fear of too much power and control falling into the hands of too few led the Framers to include article II, section 9 and article III, section 1 into the 1851 Constitution.

Over time, the Attorney General's office has developed a four-step analysis

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293. IND. CODE § 34-17-2-5 (2003).

294. State *ex rel.* Bishop v. Crowe, 50 N.E. 471 (Ind. 1898).

295. *Id.*

296. State *ex rel.* Strass v. Tancey, 69 N.E. 155 (Ind. 1903).

297. IND. CODE § 34-17-2-6 (2003).

298. *Id.* § 34-17-2-6; *see also* Chambers v. State *ex rel.* Barnard, 26 N.E. 893 (Ind. 1891); State *ex rel.* Hatfield v. Ireland, 29 N.E. 396 (Ind. 1891); State *ex rel.* Ault v. Long, 91 Ind. 351 (1883).

299. IND. CODE § 34-17-3-2 (2003).

300. *Id.*

301. 157 N.E. 51 (Ind. 1927), *cert. denied*, 277 U.S. 605 (1928).

302. *Id.*

to determine if holding more than one office is permitted. The analysis begins by ascertaining whether article II, section 9 directly prohibits the holding of a second office. Only if both positions are considered lucrative and offices will there be a violation of article II, section 9. In some cases where both positions are considered lucrative offices, one of the positions may be found to have been specifically exempted by statute from the lucrative office restriction.

The General Assembly can carve out exceptions by going through the amendment process to expand or limit the effect of article II, section 9. However, if the General Assembly chooses to pass a statute rather than to attempt to amend the constitution, the courts must use construction to determine whether the statute encroaches on the constitution. A constitutional interpretation that adheres to a literal interpretation would presumably rule that an exemption would conflict with article II, section 9 because that section expressly prohibits more than one lucrative office. Furthermore, debates between the framers suggest the intended purpose of article II, section 9 should only allow for exceptions to be created through the amendment process. However, courts have at times given great deference to the broad power of the legislature and often assume the best restraint of the legislature is the will of the people.

If the Attorney General does not find a violation under article II, section 9, the analysis moves to the second step--article III, section 1. The separation of powers doctrine serves as a check on each of the separate departments of state government from any control or influence by either of the other state government departments. Article III, section 1 relates only to state government and officers charged with duties under one of the separate departments of the state and not to municipal governments and officers.

The fact that certain dual office holding does not violate constitutional provisions does not determine finally whether it is permissible. It is necessary to consider the third step in the Attorney General's analysis, whether the two positions are incompatible. This analysis includes additional tests such as public policy and conflict of interests. Finally, the last step, which requires review, is whether local ordinances or regulations prohibit such multiple position holding.

Generally, a public officer is prohibited from holding two incompatible offices at the same time. The only enforcement for a claim of dual office holding is a legal challenge in a local court. Indiana courts have held that if a state office holder accepts a second lucrative state office this automatically vacates the first office.

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NOTES

THE CONSTITUTIONAL AND ECONOMIC IMPLICATIONS OF A NATIONAL CAP ON NON-ECONOMIC DAMAGES IN MEDICAL MALPRACTICE ACTIONS

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INTRODUCTION

Imagine waking in a hospital bed. As you gain consciousness, you attempt to move and stretch out. At this moment you realize that your left leg has been completely removed from your hip down. After overcoming the shock of what has happened, you come to realize that your leg had to be removed as the result of medical malpractice on the part of the hospital and doctors that were treating you. Feeling that you have been the victim of a great injustice, you turn to the legal system for compensation for having been robbed of your leg for the remainder of your life.

This is similar to the story of Gilford Tyler. After a one week jury trial in a Maryland court, Mr. Tyler was awarded $4.5 million in non-economic damages to compensate for the loss of his limb, his permanent disfigurement, and the pain and suffering he would endure for the rest of his life as a result of medical malpractice. However, the court reduced Mr. Tyler's non-economic damages award to only $515,000 as called for by the Maryland Medical Malpractice Act's cap on non-economic damages. The trial judge noted, "The thought that the injuries sustained by the Plaintiff are, in any way, compensated by $515,000 is, facially abhorrent."[1]

The tragic effect of medical malpractice caps upon some of society's most severely injured individuals is only one aspect of the problems facing America's health care system. It is readily apparent that the system has problems which must be addressed. No scholarly note is needed to recognize that the cost of health-care is ever rising. Medical malpractice insurance premiums continue to increase as well. Physicians and hospitals are constantly calling for reform. Another travesty is the story of the physician who worked hard to become a good health care professional, but is then forced to quit the practice of medicine all together or move to another state because he or she cannot afford the climbing cost of medical malpractice insurance coverage. Caps on damages in medical malpractice actions have been hailed by many to be the answer to the problem, shifting the burden from hospitals and physicians to the few who are severely and tragically injured by their malpractice.

In the last thirty years, many states have passed similar legislation imposing caps on non-economic damages in medical malpractice actions.[2] Such caps have been passed in response to increases in medical malpractice insurance premiums which have been argued to be at the source of a perceived health-care crisis.[3]

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1. American Trial Lawyers Association, *ATLA Press Room, Fact Sheet: Who Pays For Caps?*, *at* http://www.atla.org/ConsumerMediaResources/Tier3/press_room/FACTS/medmal/One%20Pagers/medmal.cap.examples.aspx (last visited Jan. 13, 2002).

2. Carol A. Crocca, Annotation, *Validity, Construction, and Application of State Statutory Provisions Limiting Amount of Recovery in Medical Malpractice Claims*, 26 A.L.R. 5th 245 (1995).

3. Patricia J. Chupkovich, Comment, *Statutory Caps: An Involuntary Contribution to the Medical Malpractice Insurance Crisis or a Reasonable Mechanism for Obtaining Affordable Healthcare?*, 9 J. CONTEMP. HEALTH L. & POL'Y 337, 337 (Spring 1993) (citing Daryl L. Jones, Note, Fein v. Permanente Medical Group*: The Supreme Court Uncaps the Constitutionality of*

These measures have come under heavy attack for being unconstitutional and having questionable economic impact, largely due to the inherent inequity in burdening the most severely injured victims of malpractice.[4] The results of these attacks have been mixed.[5]

Since 1995, the U.S. House of Representatives has passed legislation seven times that would impose a national cap on non-economic damage awards in medical malpractice actions, but such measures have failed to pass through the U.S. Senate.[6] Most recently, The Help Efficient, Accessible, Low-Cost Timely Healthcare Act of 2003, which would have capped non-economic damage awards in medical malpractice actions at $250,000, was passed by the United States House of Representatives in March of 2003, but in July, a similar measure was blocked by a filibuster in the Senate.[7] The vote on these measures has generally come down along party lines, with the most recent pieces of legislation being backed by President George W. Bush.[8]

President Bush placed a national cap on non-economic damages in medical malpractice actions at the forefront of his domestic agenda, addressing his proposal for such a cap in his State of the Union Addresses in 2003 and again in 2004.[9] With the nation turning its attention to the 2004 election, medical malpractice caps will likely be a hotly debated issue again this year. As the political stimulus to pass a national medical malpractice cap grows, it is important to analyze the merits of such a measure. If the state experience with caps serves as any indicator, any national cap is sure to face constitutional challenges, as well as attacks under economic theory. This Note will analyze the constitutional and economic implications of a national cap on non-economic damages in medical

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Statutory Limitations on Medical Malpractice Recoveries, 40 U. MIAMI L. REV. 1075, 1078 (1986) (explaining that physicians, the insurance industry, and legislators referred to the phenomenon of increases in malpractice claims as a "medical malpractice crisis"). The frequency of medical malpractice claims rose from about one per one hundred doctors in 1960 to seventeen per one hundred doctors in the mid 1980s. Paul C. Weber, MEDICAL MALPRACTICE ON TRIAL 94 (1991).

4. Crocca, *supra* note 2, at 245.

5. *Id.*

6. *See* Help Efficient, Accessible, Low-Cost Timely Healthcare (HEALTH) Act of 2003, H.R. 5, 108th Cong. (2003); Help Efficient, Accessible, Low-Cost Timely Healthcare (HEALTH) Act of 2002, H.R. 4600, 107th Cong. (2002); Balanced Budget Act of 1997, H.R. 2015, 105th Cong. (1997); Health. Coverage Availability and Affordability Act of 1996, H.R. 3160, 104th Cong. (1996); Common Sense Product Liability Legal Reform Act of 1996, H.R. 956, 104th Cong. (1996); Balanced Budget Act of 1995, H.R. 2491, 104th Cong. (1995); *see also* Perry H. Apelbaum & Samara T. Ryder, *The Third Wave of Federal Tort Reform: Protecting the Public or Pushing the Constitutional Envelope*, 8 CORNELL J.L. & PUB. POL'Y 591, 630-31 (Spring 1999).

7. Sheryl Gay Stolberg, *Senate Refuses to Consider Cap on Medical Malpractice Awards*, N.Y. TIMES, July 10, 2003, Late Edition, at A20.

8. *Id.*

9. Associated Press, *Bush Stumps for Cap on Malpractice Suits*, INDIANAPOLIS STAR, Jan. 17, 2003, at A6; *Major Points in President Bush's State of Union Address, Jan. 26, 2003, at* http://www.nbc17.com/news/1941889/detail.html (last visited Jan. 28, 2003).

malpractice actions, discuss the feasibility of such a cap to achieve the goals of its proponents, and suggest alternative solutions with the potential to achieve the goals of proponents of medical malpractice caps without forcing the most severely injured victims of malpractice to shoulder the burden.[10]

Part I of this Note provides the background necessary to understand the debate surrounding medical malpractice caps on damages. This part briefly surveys the history of the national healthcare "crisis," the role medical malpractice litigation has played in it, and the theoretical arguments advocated by proponents and opponents of caps on medical malpractice non-economic damages. The constitutional and economic questions are analyzed in later sections, and a brief summary of the present status of state law on damages caps is provided.

Part II of the Note analyzes the case law relevant to determining the constitutionality of a national cap on non-economic damages in medical malpractice actions. The right to trial by jury, the constitutional separation of powers, the guarantee of equal protection, and due process rights are each analyzed. In subpart 1 of each of these sections, the Note first summarizes the importance of state constitutional rulings on caps for non-economic damages in medical malpractice actions in order to provide support for the federal analysis by revealing the key arguments that have already been made in this area. Then, subpart 2 of each section discusses any relevant decisions based on the federal constitution. Finally, subpart 3 of each section analyzes the potential outcome of the constitutional challenge and note the key concerns for legislators under each attack. This section concludes with some drafting suggestions to minimize the likelihood that a national cap might be found unconstitutional.

Part III discusses the economic effect of a national cap in terms of the potential of a national cap to fulfill its legislative purpose or the goals of the tort law system, as well as the potential impact a cap may have on areas outside the health industry. Part IV discusses the viability of alternative solutions and the potential to remedy the crisis without forcing the most severely injured victims of malpractice to shoulder the burden for all of society. Finally, this Note concludes that while a national cap on non-economic damages in medical malpractice actions is likely to pass constitutional muster, Congress would be wise to attempt less invasive limitations first. Congress should seek out better economic data, upon which to base their decisions, and ensure the crisis will be averted with minimal negative consequences.

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10. It is important to note at the onset that the sole focus of this note is non-economic damage caps in medical malpractice actions. Any discussion or analysis of other types of damages (i.e., punitive damages and economic damages, etc.) and other types of actions (i.e., personal injury, wrongful death, workers' compensation, etc.) is mainly incidental and used for purposes of analogy or distinction.

I. BACKGROUND

A. The Role of Medical Malpractice Awards in the National Healthcare "Crisis"

The increasing cost of healthcare has been one of the most pressing problems in America in the last half century. Scholars, politicians, and industry experts have pointed fingers at many factors that could be the source of the problem and proposed many solutions to solve the perceived crisis. One of the most oft referred to culprits of the increasing cost of healthcare is increased insurance premiums for healthcare professionals and facilities. Medical malpractice insurance premiums and overall healthcare insurance costs have risen dramatically since the 1970s.[11] The alleged source of the increasing cost of medical malpractice insurance has been the tort system. As the argument goes, medical malpractice claims have increased in frequency, and jury awards have become excessive. Some commentators have argued that the medical malpractice crisis is very real and tort reforms are essential to ameliorate it, while others argue there is no real crisis at all and tort reforms will only compound the problem.[12]

"In 2002 alone observers say, healthcare costs could jump by as much [as] 13 percent. . . . Without adequate malpractice insurance, many healthcare providers are either abandoning certain high risk procedures or leaving their practices altogether."[13] Those observers seemed to hit the mark. Medical malpractice insurance premiums are increasing, and it is having a marked effect on the provision of healthcare services. The most recent illustration of this was the well-publicized physician strikes in Florida, West Virginia, and New Jersey in late 2002 and early 2003, where surgeons walked out in an effort to urge state policy makers to do something about the increase in medical malpractice insurance premiums.[14]

1. Proponents of Caps: Arguments Advanced by Healthcare and Insurance Industries.—It is no surprise that the American Medical Association (AMA) and

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11. Richard A. Posner, *Trends in Medical Malpractice Insurance, 1970-1985*, 49 LAW & CONTEMP. PROBS. 37 (1986).

12. *Compare* Patricia M. Danzon, *The Effects of Tort Reforms on the Frequency and Severity of Medical Malpractice Claims*, 48 OHIO ST. L.J. 413, 416 (1987), *with* Richard L. Abel, *The Real Tort Crisis: Too Few Claims*, 48 OHIO ST. L.J. 443, 446 (1987), *and* Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1120-26 (1996).

13. Council of Insurance Agents & Brokers, *Medical Malpractice Costs Skyrocket*, *at* http://www.insworld.com/web/broker/assurex_global/archive/ebmay02.asp (last visited Nov. 30, 2002).

14. Associated Press, *Doctors Take to Streets to Win Malpractice Reforms*, *at* http://www.cnn.com/2003/HEALTH/02/01/doctors.distress.ap/index.html (last visited Mar. 3, 2003); Associated Press, *Surgeons Strike in West Virginia*, *at* http://www.cbsnews.com/stories/2003/01/02/national/printable535018.shtml (last visited Jan. 7, 2003); CNN, *N.J. Doctors Stage Work Stoppage: Medical Workers Protesting Rising Malpractice Premiums*, *at* http://www.cnn.com/2003/HEALTH/02/03/nj.doctors/index.html (last visited on Mar. 3, 2003).

insurance industry lobbyists are leading the push towards a national cap on medical malpractice damages. Less damages mean less payouts, which means lower insurance premiums. Proponents cite to increasing costs of medical malpractice litigation, "[a]verage jury awards in medical malpractice cases have increased by 43 percent, from $700,000 in 1999 to $1 million in 2000."[15] They further argue that the reason jury awards have increased so much is the increased willingness of juries to irrationally overcompensate victims of malpractice with excessive jury awards for pain and suffering and other non-economic damages. They argue that with caps on these damages, "real" losses, i.e., economic damages, are still compensated. From this perspective, non-economic damages are problematic because it is difficult to place a dollar value on them; therefore, they should be less essential to a fair system of compensation.[16] It is also argued that many malpractice claims are frivolous, and caps would discourage such claims, with less likelihood of plaintiffs obtaining substantial windfalls. Statistics show that plaintiffs prevail less in medical malpractice suits than any other tort or personal injury claim.[17]

2. Opponents of Caps: Arguments Advanced by Trial Lawyers & Consumer Advocates.—According to opponents of caps, the limitations are unfair and likely to breed more malpractice:

> These tort reform measures have four things in common: insurance companies save money; incompetent doctors avoid blame and any meaningful form of discipline; patients and their families, who have been destroyed in the process, are prevented from obtaining financial compensation, the only kind of justice available to them; and, the general public is left unprotected from doctors who may maim and kill their patients.[18]

The American Trial Lawyers' Association (ATLA) and consumer groups lead the charge against caps. These groups often accuse proponents of mischaracterizing statistics and accuse insurance companies of practicing bad business. Opponents of caps argue that not enough malpractice claims are filed: "A study done by the Harvard Medical Practice Study Group determined that for every [eight] instances of medical malpractice, only [one] claim was actually filed."[19] They argue that the low winning percentage for plaintiffs in medical

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15. *Bush Stumps for Cap on Malpractice Suits*, *supra* note 9.

16. Martha Chamallas, *The Disappearing Consumer, Cognitive Bias and Tort Law*, 6 ROGER WILLIAMS U. L. REV. 9 (2001).

17. *Id.* (citing U.S. DEP'T OF JUSTICE, BUREAU OF JUST. STATS., TORT TRIALS AND VERDICTS IN LARGE COUNTIES, 1996 (Aug. 2000)).

18. Dr. Harvey F. Wachsman, *Individual Responsibility and Accountability: American Watchwords for Excellence in Healthcare*, 10 ST. JOHN'S J. LEGAL COMMENT. 303, 317 (Spring 1995).

19. ATLA Press Room, *Fact Sheet: Don't Believe the Insurance Companies' Excuses: Lawsuits Are Not the Cause of Rising Medical Malpractice Insurance Rates*, *at* http://www.atla.org/ConsumerMediaResources/Tier3/press_room/FACTS/medmal/One%20Pag

malpractice suits is not evidence of frivolous suits, but is really evidence that doctors are already over-protected by the inherent difficulty in getting expert medical testimony against a practicing physician.[20]

Opponents of caps also argue that the real problem lies with the insurance companies' mismanagement and unethical practices. "In 1999, . . . [medical malpractice insurers] garnered 14.2% profit, while property/casualty [insurers] made 8.2%."[21] A letter written by Robert Hunter, advisor to President Ford during the medical malpractice insurance crisis in the 1970s, to President George W. Bush, criticized a Department of Health and Human Services report.[22] He found that the Department's report provided inaccurate and erroneous information to the President blaming high jury awards for escalating medical malpractice rates.[23] He asserted that "the economic cycle of the insurance industry and the industry's own business practices" were the real culprit as was the case in the 1970s and 80s.[24] Because of these practices, opponents would warrant caution in considering caps because there are no guarantees that physicians and consumers will see any impact as insurers are the ones who get all the savings.[25]

Another key argument against such caps is that by subsidizing the cost of insurance for physicians who practice bad medicine, society loses. It is argued that the likelihood of a high jury verdict for malpractice is a key motivating factor for physicians to practice "good" medicine.

> [T]he American people need reforms that protect the public, not reforms that blame the injured, the disabled, and victims of medical ineptitude and neglect. The reforms advanced by tort reform proponents, purportedly in the public interest, are actually in the interests of the thousands of physicians who will be allowed to practice bad medicine, undetected, undeterred, and untroubled by their conscience.[26]

It is also often cited by opponents of caps that "[t]he direct total cost of the

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ers/dont%20blame%20lawsuits%20new.aspx (last visited Nov. 30, 2002) (citing Harvard Medical Practice Study Group, *Patients, Doctors, and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York*, Harvard University (1990)).

20. *Id.*

21. ATLA Press Room, *Fact Sheet: Lawyers Are Not the Cause of Rising Medical Malpractice Insurance Rates*, *at* http://www.atla.org/medmal/notcause.pdf (last visited Nov. 30, 2002) (citing NAT'L ASS'N OF INS. COMM'RS, PROFITABILITY BY LINE BY STATE IN 1999 (2001)).

22. Consumer Fed'n of Am., *President's Medical Malpractice Plan Based on Biased, Inaccurate Information CFA Identifies Insurer Practices as Cause of Soaring Rates*, *at* http://www.consumerfed.org/073102medmalrelease.html (released to press on July 31, 2002) (last visited Nov. 30, 2002).

23. *Id.*

24. *Id.*

25. *US House Passes Bill to Cap Malpractice Awards*, *at* http://health_info.nmh.org/HealthNews/reuters/NewsStory092600236.htm (last visited Nov. 18, 2002).

26. Wachsman, *supra* note 18, at 324.

malpractice system is less than one percent of total health care expenditures."[27] Therefore, it is argued that claims by proponents of caps that they will decrease the overall cost of healthcare or remedy the perceived national healthcare crisis are simply irrational.

Nonetheless, as Benjamin Disraeli once said, "[T]here are three kinds of lies: lies, damned lies and statistics."[28] Statistical information can be cited in support of both opponents and proponents of caps. Nonetheless, several things are clear and are discussed in more detail in the economic analysis of this Note in Part III: medical malpractice costs are increasing; remedying the cost of medical malpractice insurance will not, in and of itself, solve the problem of increasing health costs; caps on damages may reduce malpractice insurance premiums; and, many unwanted side-effects could result from such caps. The economic effects of caps are at the source of the problems that they present.

B. Two Key Problems

> [C]aps on non-economic damages in medical malpractice are most unfair because of the nature of the claim. . . . The problem . . . is that individuals suffer loss so that society can control medical costs and encourage physicians to stay in business[,] . . . [c]aps in medical malpractice cases punish those who suffer the most . . . [seriously injured and the young]. . . caps on non-economic damages are unfair because they affect the poor and economically disadvantaged most severely."[29]

The inherent inequity burdening the most severely injured victims of malpractice is the catalyst for the constitutional and economic problems concerning caps on non-economic damages in medical malpractice actions.

1. Constitutional Uncertainty.—The Supreme Court has not made a definitive ruling on the constitutionality of damage caps, and state court decisions are all across the board. A national cap on non-economic damages in medical malpractice actions will present the Court the opportunity to clear up confusion in this area of the law. This Note undertakes the academic endeavor of sorting out the constitutional arguments made for and against caps on non-economic damages in an effort to determine if such a cap would be found constitutional by the nation's high court. The constitutional arguments against state caps have come down on a variety of grounds. Some challenges have come on grounds of state constitutional provisions that have no analogous federal provision. Others, more notably, have dealt with right to trial by jury, the separation of powers, equal protection, and due process clauses and will be helpful in consideration of

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27. ABA, *Legislative and Governmental Priorities 2002: Healthcare Accountability: Medical Malpractice*, *at* http://www.abanet.org/poladv/priorities/medmal.htm (last visited Nov. 18, 2002).

28. THE OXFORD DICTIONARY OF QUOTATIONS 249 (1992).

29. Kathleen E. Payne, *Linking Tort Reform to Fairness and Moral Values*, 1995 DET. C.L. MICH. ST. U. L. REV. 1207, 1228 (Winter 1995).

the constitutionality of a national cap. This section goes beyond determining the potential for constitutionality to discuss how a cap could be drafted to ensure its constitutionality.

2. Economic Uncertainty.—There are several economic concerns that need to be considered by policy makers in this arena. The first consideration is simply the potential for caps to achieve their purported economic goals. The Texas Supreme Court noted that a state commission could not conclude there was any correlation between a damage cap and the legislative purpose of improved healthcare as data was insufficient, while an independent study concluded there was no relationship between a damage cap and increased insurance rates, because less than 0.6% of all claims brought are over $100,000.[30] Furthermore, while other studies have concluded that caps do decrease malpractice premiums,[31] the overall effect to the system may be unexpected. There is evidence that the irrationality stemming from insurance company risk calculations could lead to higher actual payouts overall.[32] The impact that caps can have on settlement negotiations and welfare benefit programs may result in other economic impacts that need further consideration. The goal of this Note is to identify these constitutional and economic pitfalls in an effort to suggest the proper course of action from an overall policy making perspective, as opposed to an isolated analysis of solely malpractice insurance itself.

C. Where the States Stand

After more than thirty years of tort reform, states are far from finding a universal solution to rising malpractice insurance premiums. The state experience has been varied, as is the current landscape of state law on caps on non-economic damages in medical malpractice actions. The attached tables provide a summary of where the individual states currently stand on medical malpractice caps on non-economic damages. Twenty states have a cap, and seventeen states have

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30. Lucas v. United States, 757 S.W.2d 687, 691 (Tex. 1988) (citing THE KEETON REPORT at 7; and SUMNER, THE DOLLARS AND SENSE OF MALPRACTICE INSURANCE 9 (Aft Books 1979)).

31. *See* U.S. Congress, Office of the Technology Assessment, *Impact of Legal Reforms on Medical Malpractice Costs*, OTA-BPH-H-1 19 (Oct. 1993) [hereinafter Congressional Assessment] (discussing results of six independent studies: E.K. Adams & S. Zuckerman, *Variation in the Growth and Incidence of Medical Malpractice Claims*, 9 J. HEALTH POL. POL'Y & L. 475, 475-88 (1984); D. K. Barker, *The Effects of Tort Reform on Medical Malpractice Insurance Markets: An Empirical Analysis*, 17 J. HEALTH POL. POL'Y & L. 143, 143-61 (1992); G. Blackmon & R. Zeckhauser, *State Tort Reform Legislation: Assessing Our Control of Risks*, TORT L. & PUB. INT. (New York W.W. Norton & Co., 1991); P.M. Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence*, 49 LAW & CONTEMP. PROBS. 57, 57-84 (1986); F.A. Sloan et al., *Effects of Tort Reforms on the Value of Closed Medical Malpractice Claims: A Microanalysis*, 14 J. HEALTH POL. POL'Y & L. 663, 663-89 (1989); S. Zuckerman et al., *Effects of Tort Reforms and Other Factors on Medical Malpractice*, 27 INQUIRY 167, 167-82 (1990)).

32. William P. Gronfein & Eleanor DeArman Kinney, *Controlling Large Claims: The Unexpected Impact of Damage Caps*, 16 J. HEALTH POL. POL'Y & L. 441 (1991).

ruled that their current cap is constitutional. However, of the remaining thirty states that do not have a cap, eight previously had one but found it to violate state and/or federal constitutional rights. Another three that now have caps once found previous versions unconstitutional. The twenty-eight states that have ruled on the constitutionality of caps provides a body of experience to frame this Note's discussion of the constitutionality of a national cap on non-economic damages in medical malpractice.

II. CONSTITUTIONAL CHALLENGES TO A NATIONAL CAP ON NON-ECONOMIC DAMAGES IN MEDICAL MALPRACTICE ACTIONS: LESSONS LEARNED FROM THE STATES, THE FEDERAL EXPERIENCE, AND POTENTIAL OUTCOMES

State high courts have both upheld and struck down statutory caps on non-economic damages in medical malpractice actions on numerous grounds.[33] This section analyzes the major rationales in support of such rulings that came down on state constitutional grounds that were analogous to some key federal constitutional provisions.[34] Then, rulings that came down on federal constitutional grounds are discussed. Finally, potential outcomes of constitutional challenges to a national cap on non-economic damages in medical malpractice actions are discussed. While this Note attempts to discuss the constitutional provisions that are implicated by caps on damages on an individual basis, it is notable that there is some overlap in the analysis of each of these constitutional provisions.

A. The Seventh Amendment Right to Trial by Jury

Many states have had challenges to damage caps based on grounds that such

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33. For an excellent summary of judicial opinions on the constitutional validity, construction, and application of state statutory caps on damages in medical malpractice claims through 1995, see Crocca, *supra* note 2; *see also* Matthew W. Light, Note, *Who's The Boss?: Statutory Damage Caps, Courts, and State Constitutional Law*, 58 WASH. & LEE L. REV. 315 (Winter 2001).

34. It is important to note that several state court opinions have also struck down or upheld statutory caps on non-economic damages in medical malpractice actions in part or solely under provisions that are unique to specific state constitutions and not particularly relevant to the federal analysis. *See* Smith v. Dep't of Ins., 507 So.2d 1080, 1087-89 (Fla. 1987) (discussing open courts provisions of state constitutions); Kirkland v. Blaine County Med. Ctr., 4 P.3d 1115, 1120-21 (Idaho 2000); Wright v. Cent. DuPage Hosp. Ass'n, 347 N.E.2d 736, 743 (Ill. 1976) (discussing state constitutional provisions on special legislation); Kan. Malpractice Victims Coalition v. Bell, 757 P.2d 251, 263-64 (Kan. 1988) (criticized by Bair v. Peck, 811 P.2d 1176 (Kan. 1991)); Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 904-05 (Mo. 1993); Knowles v. United States, 544 N.W.2d 183, 203-04 (S.D. 1996); *Lucas*, 757 S.W.2d at 690-92; Pulliam v. Coastal Emergency Serv. of Richmond, Inc., 509 S.E.2d 307, 315 (Va. 1999), *aff'g* Etheridge v. Med. Ctr. Hosp., 376 S.E.2d 525, 533 (Va. 1989). Furthermore, many of the statutes in question in the cases discussed in this Note go beyond merely addressing non-economic damages or medical malpractice actions. Such instances are noted throughout where relevant.

caps violate the right to trial by jury. The typical state constitutional provision for this right states that "the right to trial by jury is inviolate."[35] The argument is that damages in a medical malpractice action are factual determinations to be made by the jury. Therefore, it violates an individual's right to trial by jury when a legislature takes that determination away from the jury through the use of a cap on damages.

1. Importance of Challenges Under Analogous State Constitutional Provisions.—

a. Finding caps violated a right to trial by jury.—State court decisions that have found caps on non-economic damages in medical malpractice actions to violate the state right to trial by jury have relied on several key findings.[36] The Oregon Supreme Court's 1993 decision in *Lakin v. Senco Products, Inc.*, provides a good example of the typical analysis these courts have taken.[37] The first and most crucial step has been a historical analysis of the scope of jury functions at the time the rights were adopted in the state constitution. The *Lakin* court concluded that the assessment of damages was a factual determination and a function of a common law jury at the time the Oregon constitution was adopted in 1851. Therefore, it was unconstitutional for the legislature to take that power from the jury in passing a statutory cap.[38] The Washington Supreme Court recently criticized courts that have upheld damages caps in light of the right to trial by jury because they "either have not analyzed the jury's role in the matter or have not engaged in the historical constitutional analysis used by" courts that have struck down caps on these grounds.[39]

Furthermore, state courts that have found caps to be unconstitutional under the right to trial by jury have distinguished similar caps on several grounds. The *Lakin* court, distinguished caps on damages in wrongful death actions which were

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35. *See* FLA. CONST. art. I, § 22; IND. CONST. art. I, § 20; KAN. CONST., Bill of Rights § 5; OHIO CONST. art. I, § 5; OR. CONST. art I, § 17; TEX. CONST. art. I, § 15; WASH. CONST. art. I, § 21.

36. *See* Smith v. Schulte, 671 So.2d 1334, 1342-46 (Ala. 1995); *Wright*, 347 N.E.2d at 736; Kan. Malpractice Victims Coalition v. Bell, 757 P.2d 251, 263-64 (Kan. 1988) (finding caps on recovery and mandatory annuity payments violate the right to jury trial and right to a remedy through due course of law); Lakin v. Senco Prods., Inc., 987 P.2d 463, 468-75 (Or. 1993); Lucas v. United States, 757 S.W.2d 687, 690-92 (Tex. 1988) (holding $500,000 cap on total medical malpractice damages violates right to remedy end jury trial); Condemarin v. Univ. Hosp., 775 P.2d 348, 365-66 (Utah 1989) (plurality opinion) (striking balance in favor of constitutional right of jury trial); Sofie v. Fibreboard Corp., 771 P.2d 711, 715-28 (Wash. 1989) (holding statutory limit on non-economic damages in personal injury and wrongful death actions violated the state right to trial by jury). For further analysis of the Utah medical malpractice cap and the decision in *Condemarin*, see James E. Magleby, *The Constitutionality of Utah's Medical Malpractice Damages Cap Under the Utah Constitution*, 21 J. CONTEMP. L. 217 (1995).

37. 987 P.2d at 468-75.

38. "The amount of damages . . . from the beginning of trial by jury, was a 'fact' to be found by the jurors." *Id.* at 470 (quoting CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES 24 (1935)).

39. *Sofie*, 771 P.2d at 723.

held constitutional, because such actions did not exist at common law, as medical malpractice actions did as a subset of personal injury.[40] The court reasoned that since wrongful death actions were created by the legislature, the legislature could limit the manner in which damages were awarded. However, the legislature had no power to limit awards in actions existing at common law before the legislature was created.[41] The *Lakin* court also distinguished judicial remittitur, which has long been held to not violate the right to trial by jury. The court reasoned that remittitur was permissible because it was discretionary and the plaintiff was given a right to appeal, as opposed to the mandatory nature of the statutory cap in question.[42]

b. Upholding caps over trial by jury challenges.—Several state courts have upheld caps over challenges on the right to trial by jury.[43] The Virginia Supreme Court has been cited and discussed by many other courts ruling on this issue. Virginia first upheld a medical malpractice cap over multiple constitutional challenges in the 1991 decision of *Etheridge v. Medical Center Hospitals* and most recently affirmed its ruling in the 1999 decision of *Pulliam v. Coastal Emergency Services of Richmond, Inc.*[44] The key distinction between these decisions has come along the lines of how the jury's function has been viewed or

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40. *Lakin*, 987 P.2d at 473.

41. *Id.*

42. *Id.*

43. Kirkland v. Blaine County Med. Ctr., 4 P.3d 1115, 1118-20 (Idaho 2000); Pulliam v. Coastal Emergency Serv. of Richmond, Inc., 509 S.E.2d 307, 315-17 (Va. 1999) (holding that $1 million limit on recoveries in medical malpractice actions did not violate the right to jury trial, special legislation, or separation of powers provisions of state constitutions, nor the takings, due process, or equal protection provisions of the state or federal constitutions), *aff'g* Etheridge v. Med. Ctr. Hosp., 376 S.E.2d 525 (Va. 1989); Scholz v. Metro. Pathologists, P.C., 851 P.2d 901, 905-06 (Colo. 1993); Johnson v. St. Vincent Hosp., Inc., 404 N.E.2d 585, 601-02 (Ind. 1980); Samsel v. Wheeler Transp. Serv., Inc., 789 P.2d 541, 549-58 (Kan. 1990); Murphy v. Edmonds, 601 A.2d 102, 116-18 (Md. 1992); Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 904-07 (Mo. 1993); Wright v. Colleton County Sch. Dist., 391 S.E.2d 564 (S.C. 1990); Knowles v. United States, 544 N.W.2d 183, 202-03 (S.D. 1996). For detailed analysis and favorable treatment of *Kirkland*, see Shaila Prabhakar, *Tort Reform—Cap on Noneconomic Damages Does Not Violate Right To Jury Trial.* Kirkland v. Blaine County Medical Center, *4 P.3d 1115 (Idaho 2000)*, 32 RUTGERS L.J. 1087 (2001).

44. *Pulliam*, 509 S.E.2d 307. There are two important distinctions to the Virginia cases which, however, have no bearing on our analysis. First, the cap in question in Virginia is a cap on total damages, not merely non-economic damages. *See* VA. CODE § 8.01-581.15. Second, the Virginia constitutional provision for the right to jury trial is a bit unique. It reads, "[I]n controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred." VA. CONST. art. I, § 11. For a critical analysis of the Virginia Supreme Court's decision in *Pulliam*, see Elizabeth Anne Keith, Pulliam v. Coastal Emergency Services of Richmond, Inc.: *Reconsidering the Standard of Review and Constitutionality of Virginia's Medical Malpractice Cap*, 8 GEO. MASON L. REV. 587 (2000) (concluding that Virginia's medical malpractice cap should be found unconstitutional).

characterized. The *Pulliam* court found that part of the jury's fact-finding function is to assess damages; however, once assessed, the jury's constitutional function is complete. It is the court's duty to apply the law to the facts, and remedy is a matter of law, not fact. Because the trial court applies the limitation after the jury has made its damages assessment, the right to trial by jury is not violated.[45]

Other courts upholding caps over challenges on the right to jury trial have focused on the legislature's power to venture into the jury's function. The opinion of the South Dakota Supreme Court in *Knowles v. United States* is representative of courts that have gone very far into this line of thinking.[46] The *Knowles* court found that civil damages were not an essential element of the jury's function as retained at common law, that the common law never recognized a right to full recovery in tort, and that "[o]ur legislature retains the power to change a remedy or abolish it and substitute a new remedy, so long as it does not deny a remedy."[47] However, most courts have not gone so far. More illustrative of the reasoning of the majority of courts that have upheld caps is the concept that the legislature merely has the power to set the outer limits of the remedy.[48]

These determinations can often depend upon interpretation of state law. For example, the Idaho Supreme court upheld a medical malpractice cap on non-economic damages largely because, under the Idaho constitution, the legislature had the power to modify or repeal common law causes of action.[49] The court addressed the question on certification from a federal court.[50] As the court reasoned, if the legislature has the power to abolish common law rights, it therefore has the power to limit the remedies available for a cause of action.[51]

2. Federal Law & Experiences.—Many of the state decisions which came down on challenges to caps based on the right to trial by jury have also discussed whether the cap did or did not violate the Seventh Amendment. Commentators have also discussed the implications of the Seventh Amendment upon caps on damages.[52] Few federal court decisions have directly addressed the constitutionality of a cap on Seventh Amendment grounds, but many opinions discussing the relevance of federal law to an analysis of the constitutionality of state caps are available that prove helpful to the analysis here.[53]

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45. *Id.* at 589 (citing *Etheridge*, 376 S.E.2d at 529).

46. 544 N.W.2d 183.

47. *Id.* at 202-03.

48. *See Wright*, 391 S.E.2d at 569.

49. Kirkland v. Blaine County Med. Ctr., 4 P.3d 1115, 1119 (Idaho 2000).

50. *Id.*

51. *Id.*

52. *See* Kenneth Owen O'Connor, Comment, *Funeral for a Friend: Will the Seventh Amendment Succumb to a Federal Cap on Non-Economic Damages in Medical Malpractice Actions?*, 4 SETON HALL CONST. L.J. 97 (Winter 1993).

53. It is important to note that although there are no cases discussed which have found a cap on medical malpractice damages to violate the Seventh Amendment, particularly in comparison to the larger number of cases which have held there is no Seventh Amendment violation, this should

Many of the state decisions finding caps to violate the right to trial by jury have cited United States Supreme Court precedent for support. The *Lakin* court cited Supreme Court precedent for two propositions. First, the *Lakin* court cited *Dimick v. Schiedt* and *Feltner v. Columbia Pictures Television, Inc.*[54] These two cases were cited for the proposition that the assessment of damages was a function of the common law jury as protected under the Seventh Amendment.[55] The *Lakin* court went on to cite *Hetzel v. Prince William County* for the proposition that "imposition of a *remittitur* without the option of a new trial 'cannot be squared with the Seventh Amendment.'"[56]

The Washington Supreme Court agreed with the *Lakin* court on this issue and suggested that *Dimick* rather than *Tull v. United States* provided the most informative analysis on the constitutionality of non-economic damages limits.[57] *Tull* was a case where the Supreme Court upheld civil penalty assessments, without jury involvement, under the Clean Air Act.[58] The *Sofie* court distinguished *Tull* because it did not apply to civil damages actions, but merely applied to civil penalties under a legislatively created scheme.[59]

Some federal courts have upheld state medical malpractice caps on damages over challenges to the Seventh Amendment.[60] Here again, the determination has depended upon a characterization of the jury's function. As the Fourth Circuit Court of Appeals noted, "It is not the role of the jury to determine the legal consequences of its factual findings . . . that is a matter for the legislature."[61] Some of the most convincing language on this issue came from the 1989 District Court of Maryland decision of *Franklin v. Mazda Motor Corp.*:

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not end our analysis. The key behind this anomaly lies in part because those courts that have invalidated caps based on state constitutional grounds have not needed to address the federal constitution; the state constitution was dispositive. However, courts upholding the caps have had to address all challenges. Notably, the tendency for a court to rule one way on the state issue may also show a tendency to rule the same way on the federal issue. Therefore, we cannot end our analysis merely because there are far more decisions that have specifically held there was no violation of the Seventh Amendment. This should be kept in mind in analyzing the other federal rights that will be discussed in this part of the Note as well.

54. Lakin v. Senco Prods., Inc., 987 P.2d 463, 470 (Or. 1993) (citing Dimick v. Schiedt, 293 U.S. 474, 480 (1935) and Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 353 (1998)).

55. *Id.*

56. *Id.* (quoting Hetzel v. Prince William County, 523 U.S. 208, 211 (1998)).

57. Sofie v. Fibreboard Corp., 771 P.2d 711, 725 (Wash. 1989) (discussing *Dimick* and Tull v. United States, 481 U.S. 412 (1987)).

58. *Tull*, 481 U.S. at 412.

59. *Id.*

60. *See* Boyd v. Bulala, 877 F.2d 1191 (4th Cir. 1989); Davis v. Omitowoju, 883 F.2d 1155, 1158-65 (3d Cir. 1989) (upholding $250,000 limit imposed by Virgin Islands statute); Franklin v. Mazda Motor Corp., 704 F. Supp. 1325, 1330-38 (D. Md. 1989) (upholding Maryland damages cap).

61. *Boyd*, 877 F.2d at 1196.

> Juries always find facts on a matrix of laws given to them by the legislature and by precedent, and it can hardly be argued that limitations imposed by law are a usurpation of the jury function. . . . The power of the legislature to define, augment, or even abolish complete causes of action must necessarily include the power to define by statute what damages may be recovered by a litigant with a particular cause of action . . . . Particularly in the area of damages for pain and suffering, the legislature acts within its power in creating reasonable limits on the causes of action and recoverable damages it chooses to allow in the courts of law.[62]

3. Summation: Constitutionality and Legislative Concerns Regarding the Seventh Amendment Right to Trial by Jury.—The above referenced federal court rationales have been questioned and heavily criticized by scholars who find them to be based on loose foundations.[63] Nonetheless, it is likely that a national cap on non-economic damages will be able to withstand challenges on Seventh Amendment grounds for the reasoning laid out in *Franklin*. Moreover, many of the issues implicated by the analysis under the rights of the Seventh Amendment become more problematic under the constitutional analysis of other challenges.

B. The Constitutional Separation of Powers

Constitutional challenges on separation of powers grounds are closely linked to the challenges that have come under the right to trial by jury. The crux of these challenges is that through statutory caps, the legislature improperly "delegates to itself the power of remitting verdicts and judgments, which is a power unique to the judiciary."[64]

1. Importance of Challenges Under Analogous State Constitutional Provisions.—

a. Finding caps violated state separation of powers provisions.—The state courts which have invalidated caps on damages on separation of powers grounds have focused on the cap's invasion into the judiciary's power of remittitur.[65] The Supreme Court of Illinois laid out the typical rationale in striking down a cap on these grounds in the 1997 decision of *Best v. Taylor Machine Works*.[66] First, the court discussed the doctrine of remittitur, the duty of the judiciary to ensure a jury

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62. 704 F. Supp. at 1331-32.

63. O'Connor, *supra* note 52.

64. Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1078 (Ill. 1997).

65. *See* Best v Taylor Mach. Works, 689 N.E.2d 1057, 1078-81 (Ill. 1997); State *ex. rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1085 (Ohio 1999); *see also* Wright v. Central DuPage Hosp. Assoc., 347 N.E.2d 736 (Ill. 1976); Sofie v. Fibreboard Corp., 771 P.2d 711, 715-28 (Wash. 1989) (suggesting a violation of the separation of powers but striking down statutory damage limitation on other grounds).

66. 689 N.E.2d at 1078-81.

does not award excessive verdicts.[67] The exercise of judicial remittitur must be done on a case-by-case basis as the evidence supporting a jury award varies in every case.[68] When a judge determines a remittitur is necessary, it is implemented if the plaintiff consents, and if the plaintiff does not consent, a new trial occurs.[69] The *Best* court also cited United States Supreme Court precedent for the proposition that "it has [long] been a traditional and inherent power of the judicial branch of government to apply the doctrine of remittitur" which is a "question of law for the court."[70] The court invalidated the cap in question because it acted as a "legislative remittitur" in violation of the power vested in the judiciary. The court reasoned that the statute was "mandatory and operate[d] wholly apart from the specific circumstances of a particular plaintiff's noneconomic injuries."[71]

b. Upholding caps over state separation of powers provisions.—Other States have found this Separation of Powers argument to be wholly unpersuasive.[72] The West Virginia Supreme Court dismissed the separation of powers argument in the 2001 decision of *Verba v. Gaphery*.[73] The Court found that it was completely within the state legislature's powers to enact statutes that abrogate the common law.[74] Therefore, the *Verba* court found no merit in the legislative remittitur argument.[75] Likewise, in 2000, the Idaho Supreme Court dismissed such an argument in *Kirkland v. Blaine County Medical Center*.[76] The *Kirkland* court noted that "if anything, the statute is a limitation on the rights of plaintiffs, not the judiciary."[77] Key to both of these cases, however, were the state constitutions' explicit grant of power to the legislature to modify or abolish common law causes of action.[78]

2. Federal Law & Summation.—The Separation of Powers question in this

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67. *Id.* at 1079 (noting that judiciary has a duty to remit where an award falls outside the range of fair and reasonable compensation, results from passion or prejudice, or shocks judicial conscience; but allowing awards to stand that "fall[] within the flexible range of conclusions that can reasonably be supported by the facts" as they are for the jury to determine).

68. *Id.* at 1080.

69. *Id.*

70. *Id.* at 1079 (citing Hansen v. Boyd, 161 U.S. 397, 412 (1896) and Dimick v. Schiedt, 293 U.S. 474, 484-86 (1935)).

71. *Id.* at 1080.

72. *See* Kirkland v. Blaine County Med. Ctr., 4 P.3d 1115, 1121-23 (Idaho 2000); Verba v. Ghaphery, 552 S.E.2d 406, 410-11 (W. Va. 2001); *see also* Murphy v. Edmonds, 601 A.2d 102, 116-18 (Md. 1992) (dismissing of separation of powers argument in same discussion as right to trial by jury contention); Pulliam v. Coastal Emergency Serv. of Richmond, Inc., 509 S.E.2d 307, 319 (Va. 1999).

73. 552 S.E.2d at 410-11.

74. *Id.* at 411.

75. *Id.*

76. 4 P.3d at 1121-23.

77. *Id.* at 1122.

78. *Id.*; *see also Verba*, 552 S.E.2d at 411 (discussing W. VA. CONST art. 8 § 13).

context is one in which there is not much federal law to guide our analysis. However, Congress does retain control over the jurisdiction of the United States Supreme Court and has removed specific subjects from the jurisdiction of the Court previously.[79] Nonetheless, this is one area in particular where the Court could determine that the legislature inappropriately crossed the bounds of the separation of powers. The key to the Court's ruling on such a challenge will depend on the characterization of both the judiciary's power of remittitur and the legislature's power to modify or abolish common law remedies. Congress, in attempting to preserve the constitutionality of any proposed cap, would be wise to consider means by which the separation of powers is preserved.

C. Equal Protection Guarantees

Equal protection clause challenges come as a result of differential treatment to plaintiffs in medical malpractice actions on two grounds: (1) differential treatment of plaintiffs in medical malpractice cases versus plaintiffs in other personal injury cases (who can obtain full recovery), and (2) plaintiffs severely injured through medical malpractice who have large non-economic damages versus those with small or non-existent non-economic damages from medical malpractice (who can obtain full recovery).[80] "Equal protection raises the question most fundamental to a society: Who gets what? Of course, the problem, approached from a different angle may be reformulated: Who gives up what?"[81] Under the Fourteenth Amendment, states are prohibited from denying any person "equal protection of the laws."[82] This section, known as the equal protection clause, has been made applicable to the federal government's exercise of power, under the Fifth Amendment.[83] The equal protection argument against caps on damages in this context is fairly obvious: those who suffer the most severe

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79. Light, *supra* note 33, at 361 n.321-22 (noting the following: the U.S. CONST. art III, § 2 cl. 2 authorizes Congress to make "Exceptions" and "Regulations" regarding Supreme Court jurisdiction); *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 515 (1868) ("upholding statute abrogating Supreme Court jurisdiction to hear habeas corpus appeals of certain ex-Confederates"); WILLIAM COHEN & JONATHAN D. VARAT, CONSTITUTIONAL LAW 42-43 (1997) ("discussing congressional proposals to strip Supreme Court of jurisdiction over abortion and school prayer cases").

80. A more radical argument that has been made against caps, beyond the scope of this Note, is that caps on non-economic damages will have a discriminatory impact on women's ability to obtain full compensation in tort. Lisa M. Ruda, Note, *Caps on Noneconomic Damages and the Female Plaintiff: Heeding the Warning Signs*, 44 CASE W. RES. L. REV. 197 (1993).

81. Jacqueline Ross, *Will States Protect Us, Equally, From Damage Caps In Medical Malpractice Legislation?*, 30 IND. L. REV. 575 (1997) (quoting James W. Torke, *The Judicial Process in Equal Protection Cases*, 9 HASTINGS CONST. L.Q. 279, 343 (1982)). The Ross Note provides a more detailed analysis focusing solely on equal protection guarantees and advocating state use of a higher than rational basis standard by state courts in analyzing the constitutionality of medical malpractice caps.

82. U.S. CONST. amend. XIV.

83. Bolling v. Sharpe, 347 U.S. 497 (1954).

injuries will go without full compensation for their non-economic damages, while those who suffer relatively minor injuries with few non-economic damages will be fully compensated under the law. Nonetheless, mere unequal treatment under a statutory scheme is generally, in and of itself, not grounds for finding a statute unconstitutional. The Court's analysis on equal protection grounds will depend upon the nature of the rights involved, or the grounds under which unequal treatment occurs; the interest of the state in promulgating the legislation; the relation between the differential treatment and the goal meant to be obtained; and how narrowly the law has been designed to minimize the unequal treatment involved.

It is widely accepted that the Court uses a three-tiered approach for this analysis.[84] The level of scrutiny the Court will apply increases from rational basis, to intermediate or heightened scrutiny, to strict scrutiny. Any equal protection challenge in this context will rely heavily on the level of scrutiny utilized. "The level of scrutiny utilized is critically important, as virtually any statute will be upheld under the rational basis test. Courts applying this standard almost always defer to the legislature's determination that the classification created by statute is rationally related to a legitimate state objective."[85] The rational basis test is generally used for analysis of economic or social regulation.[86] The test is very deferential to the legislature inquiring only whether the classification has a conceivable rational relationship to an end that is not prohibited by the Constitution.

Strict scrutiny analysis applies when the classification distinguishes between persons in terms of any right, upon some suspect class, such as race or national origin, or where the act classifies people in terms of their ability to exercise a fundamental right.[87] Under strict scrutiny analysis, the court independently analyzes whether there is a close and effective relationship between the classification and the goal, or ends sought, by the legislation. Provided there is a close relationship between the classification and the ends, the test then is whether the act is narrowly tailored to achieve ends that amount to a compelling

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84. Though some jurists and commentators have suggested the real analysis actually occurs on more of a spectrum than a system where everything fits into one of three neat tiers. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 453 (1985) (Stevens, J., concurring); and San Antonio Independent Sch. Dist. v. Rodriguez, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting).

85. Kevin Sean Mahoney, Note, *Alaska's Cap on Non-economic Damages: Unfair, Unwise and Unconstitutional*, 11 ALASKA L. REV. 67, 73 (June 1994).

86. *See generally* Mahoney, *supra* note 85, at 73; Ross, *supra* note 81.

87. Where a fundamental right is involved there are implications of both equal protection and substantive due process. Under substantive due process, federal protection will be given to such fundamental rights, under fundamental principles of liberty and justice and necessary under the Anglo-American scheme of ordered liberty that pertain to the States under the Fourteenth Amendment. Duncan v. Louisiana, 391 U.S. 145 (1968). For federal equal protection analysis, where a fundamental right is implicated the court generally applies a standard which varies according to the importance of the right and the nature of the burden placed on the exercise of that right. RANDY J. RILEY, EZ REVIEW FOR CONSTITUTIONAL LAW 76 (2001).

state interest.

The intermediate level of scrutiny has been applied to "quasi-suspect" classifications, mainly gender. Under the intermediate or heightened level, the legislature must show that the classification involves a "substantial relationship" to an "important" governmental interest.

1. Importance of Challenges Under Analogous State Constitutional Provisions.—

a. Finding caps violated state equal protection guarantee.—The states that have found their caps on damages in medical malpractice actions to violate the equal protection clause of state constitutions have, in most instances, relied on a higher standard than rational basis.[88] In *Moore*, the Alabama Supreme Court found a $400,000 non-economic damages cap in medical malpractice actions to be a violation of the state's equal protection clause.[89] The test applied by the *Moore* court was "whether [the classifications created] where reasonably related to the stated objective, and on whether the benefit sought to be bestowed upon society outweigh[ed] the detriment to private rights occasioned by the statute."[90] The findings in *Moore* were analogous to those that led to determinations that equal protection rights were violated in other states with similar holdings. The court relied on economic studies that found there to be little or no correlation between medical malpractice premiums and the overall cost of health care and, further, that damage caps effect on lowering medical malpractice premiums was also very small.[91] Very few damage awards were awarded above the cap, which only limited the size of the most meritorious awards and therefore did nothing to prevent frivolous claims.[92] While the effect was very remote, the burden placed on the most severely injured medical malpractice victims was very high, preventing them from obtaining total compensation.[93]

Other courts have admitted that the test used was analogous to the federal substantial relationship test of intermediate scrutiny. In *Carson v. Maurer*,[94] the New Hampshire Supreme Court invalidated the state's medical malpractice cap

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88. Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156, 165-70 (Ala. 1992), *aff'd*, Smith v. Schulte, 671 So.2d 1334 (Ala. 1995); Brannigan v. Usitalo, 587 A.2d 1232, 1234-36 (N.H. 1991), *aff'g* Carson v. Maurer, 424 A.2d 825 (N.H. 1980); Richardson v. Carnegie Library Rest., Inc., 763 P.2d 1153 (N.M. 1988); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978); Condemarin v. Univ. Hosp., 775 P.2d 348, 354 (Utah 1989) (favoring middle-tier scrutiny of legislations impinging on right to recover for negligently caused injuries).

89. *Moore*, 592 So. 2d at 170.

90. *Id.* at 166. Notably, this test does not correlate directly with any of the three tiers of the federal analysis. The court noted it was at liberty to not follow the federal tiers when applying state law and declined to comment on which of the two lower tiers their analysis was most near. *Id.* at 170.

91. *Id.* at 167-69 (citing studies from government and private sources conducted in the mid-1980's).

92. *Id.* at 169.

93. *Id.*

94. 424 A.2d 825 (N.H. 1980).

using such a test. The *Carson* court concluded that the damage cap violated equal protection rights because the limitations were imposed in an unfair, arbitrary, and unreasonable manner.[95] The court's rationale relied upon similar factors to those in *Moore*: that paid out damage awards are only a small part of total insurance premium costs and few individuals suffer non-economic damages in excess of the cap.

b. Upholding caps over state equal protection challenges.—States upholding caps over state equal protection challenges have generally applied a rational basis test, focusing on the legislation being economic in nature.[96] A typical decision of this sort was *Verba v. Gaphery* from the Supreme Court of West Virginia in 2001.[97] The *Verba* court characterized the legislation as economic in nature and therefore would not review the basis for the legislature's justification, despite statistical evidence refuting the legislature's findings in support of the cap.[98] The test as applied was very deferential to the legislature. As the court noted, "the inquiry is whether the legislature reasonably could conceive to be true the facts on which the challenged statute was based."[99] Like most of these decisions however, the *Verba* majority opinion was accompanied by a strong dissent.[100] The dissent criticized the majority for ignoring the trend amongst the states that has been to find medical malpractice caps unconstitutional.[101] The dissent asserted that "the right to recover personal injury damages is a significant substantive right requiring the application of some higher, perhaps, intermediate scrutiny."[102]

The *Verba* dissent also cited to the dissent in *Fein v. Permanente Medical Group*, the California majority opinion which upheld that state's cap on medical malpractice damages, for an interesting and persuasive logical argument: "Insurance is a device for spreading risks and costs among large numbers of people so that no one person is crushed by misfortune. . . . In a strange reversal

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95. *Id.* at 835-39.

96. Fein v. Permanente Med. Group, 695 P.2d 665, 682-84 (Cal. 1985); Scholz v. Metro. Pathologists, Inc., 851 P.2d 901, 906-07 (Colo. 1993); Samsel v. Wheeler Transp. Servs., Inc., 789 P.2d 541, 549-58 (Kan. 1990); Butler v. Flint Goodrich Hosp. of Dillard Univ., 607 So. 2d 517, 518-22 (La. 1992) (holding $500,000 cap on general damages did not violate state equal protection guarantee because the Act's limitations were reasonably related to furthering the general state interest of compensating victims; court also found a quid pro quo whereby tort victims traded full recovery for guaranteed recovery); Murphy v. Edmonds, 601 A.2d 102, 107-16 (Md. 1992); Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 904-05 (Mo. 1993); Pulliam v. Coastal Emergency Serv. of Richmond, Inc., 509 S.E.2d 307, 317-19 (Va. 1999); Verba v. Chaphery, 552 S.E.2d 406, 410 (W. Va. 2001).

97. 552 S.E.2d at 406.

98. *Id.* at 410.

99. *Id.*

100. *Id.* at 413.

101. *Id.*

102. *Id.* at 414-15 (citing decisions from the Supreme Courts of Nebraska, North Dakota, New Hampshire and West Virginia for support).

of this principle, the statute concentrates the costs of the worst injuries on a few individuals."[103] Certainly, it is somewhat of an anomaly, contrary to the idea behind insurance to uphold these types of caps on rational basis grounds. Unlike other economic regulations being upheld on rational basis grounds, the result in applying such analysis to regulation of the insurance industry does seem to strike a cord with the purpose to have such an industry in the first place. Perhaps this anomaly further provides some grounds for moving away from the rational basis test in these situations.

2. Federal Law and Experience on Equal Protection Grounds.—Few decisions finding medical malpractice damages caps violated state equal protection guarantees have gone on to hold that the statute also violated the United States Constitution.[104] In contrast, many decisions upholding caps on state equal protection grounds have gone on to do so under federal equal protection analysis as well.[105] In most of those cases, the test used for the state analysis was the federal rational basis test. In several instances, states have appealed to the United States Supreme Court to clear up confusion on this issue, but the Court has declined to do so.

The Supreme Court's decision in *Duke Power Co. v. Carolina Environmental Study Group* has been cited by several decisions on this issue and lends some insight to the analysis here.[106] In the *Duke Power* decision the Court rejected the use of the intermediate standard of review for analysis of the cap on damages resulting from a nuclear accident under the Price-Anderson Act.[107] This federal act imposed a $560 million limitation on liability for nuclear accidents resulting from operation of federally licensed private nuclear power plants.[108] The Court found rational basis was the appropriate test to apply to the classification which treated victims of a nuclear accident different from victims of personal injury

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103. *Id.* at 418 (citing *Fein*, 695 P.2d at 689-90 (Bird, C.J., dissenting)).

104. *See supra* note 53. The same concerns apply here. *But see* Waggoner v. Gibson, 647 F. Supp. 1102 (N.D. Tex. 1986) (federal district court holding medical malpractice cap on damages violated federal and state equal protection clauses), *rejected by* Lucas v. United States, 807 F.2d 414 (5th Cir. 1986); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978) (finding $300,000 cap on medical negligence violates equal protection clauses of both the North Dakota and United States Constitutions).

105. Davis v. Omitowoju, 883 F.2d 1155, 1165 (3d Cir. 1989) (finding Virgin Islands' medical malpractice damage cap of $250,000 constitutional); Franklin v. Mazda Motor Corp., 704 F. Supp. 1325, 1330-38 (D. Md. 1989); Fein v. Permanente Med. Group, 695 P.2d 665, 682-84 (Cal. 1985), *appeal dismissed* for want of a federal question, 474 U.S. 892 (1985); Butler v. Flint Goodrich Hosp. of Dillard Univ., 607 So.2d 517, 518-22 (La. 1992), *cert. denied*, 508 U.S. 909 (1993); Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 904-05 (Mo. 1993); Pulliam v. Coastal Emergency Serv. of Richmond, Inc., 509 S.E.2d 307, 317-19 (Va. 1999); Hoem v. State, 756 P.2d 780, 783 (Wyo. 1988) (holding medical malpractice tort reform violated equal protection under rational basis review).

106. Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59 (1978).

107. *Id.* at 82-93.

108. *Id.* at 65.

from other causes.[109] The Court focused on the fact that this was classic economic regulation in which deference is great to Congress's rationale in support of the classification.[110]

The *Duke Power* decision has been found directly applicable by some courts and used as the basis for applying rational basis to their analysis of state medical malpractice caps under equal protection guarantees. However, some courts choosing not to apply rational basis have distinguished *Duke Power*. The *Arneson* court's reasoning was typical, finding that *Duke Power* was distinguishable on two grounds contained in the rationale of the Supreme Court that were not present in the case of medical malpractice damages caps.[111] First, the Supreme Court relied on the "extremely remote possibility of an accident where liability would exceed the limitation."[112] Second Congress expressed a commitment to go beyond the limitation to protect the public from consequences of such an accident.[113] As the *Arneson*, court noted in the case of medical malpractice damages statutes there is both "a strong possibility of damages above the limitation and no legislative commitment beyond the limitation."[114]

3. Summation: Constitutionality and Legislative Concerns on Fifth Amendment Equal Protection Grounds.—The critical issue for a determination on constitutionality of a national cap on non-economic damages in medical malpractice actions is whether rational basis test will apply or if intermediate scrutiny or some heightened level of scrutiny will be applied. While no suspect class is involved in these cases, there is a very persuasive argument to be made that there is a fundamental right to full compensation for personal injury. There is also a strong argument to be made in favor of a heightened scrutiny test due to the anomalous situation involved in putting a cap on recovery against the insurance industry. Nonetheless, as in *Duke Power*, if it is the prerogative of the court it is easy enough to say that this is classic economic regulation at issue and rational basis will apply. As *Duke Power* also pointed out, the greater the extent to which the individual gets something in return for the limitation and the smaller the likelihood that the cap will be exceeded, the more likely a cap is to pass constitutional muster.[115] This concept comes more into play in discussion of due process rights.

D. Due Process Rights

Challenges on due process grounds are generally analyzed very similarly to

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109. *Id.* at 83.

110. *Id.*

111. Arneson v. Olson, 270 N.W.2d 125, 135 n.6 (N.D. 1978).

112. *Id.*

113. *Id.*

114. *Id.*

115. Established, in that case, through an increased congressional commitment to provide for victims and the high amount at which the cap was set. Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 83 (1978).

equal protection clause challenges.[116] It is very common for the challenges to be raised together and dealt with in the same fashion by the reviewing court. One key element that tends to be more associated with the due process analysis than that under the equal protection clause is the idea of a quid pro quo. This falls under the general analysis under the takings clause, where it is constitutional for the government to take property so long as they provide just compensation. Here the constitutionality of non-economic damages caps in medical malpractice has often hinged on the extent to which the government has given something to the victim in exchange for their potential loss of full compensation for non-economic damages.

1. Importance of Challenges Under Analogous State Constitutional Provisions.—

a. Finding caps violated state due process rights.—States striking down caps on due process grounds have often distinguished the caps at issues from others that have been upheld due to a lack of a quid pro quo.[117] The key distinctions have come in comparison to worker's compensation and to the medical malpractice statutes of Indiana and Louisiana. The 1988 Texas Supreme Court decision in *Lucas v. United States* is often cited for these distinctions.[118] A key concern for the *Lucas* court was that the statute failed to give an adequate substitute for a victim of malpractice to obtain redress for their injuries. The court rejected the argument that there was a sufficient societal quid pro quo thru

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116. *See* Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1069-78 (Ill. 1997); State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1092 (Ohio 1999) (discussing the appropriate test for due process analysis, since legislation did not involve fundamental right or suspect class, court applied the "rational relation" test where classification is "deemed valid on due process grounds '[1] if it bears a real and substantial relation to the public health, safety, morals or general welfare of the public and [2] if it is not unreasonable or arbitrary.'" (internal citation omitted). Also noting, that while *Morris* did not involve a fundamental right or suspect class, the right to a jury trial had subsequently been held by the Ohio Supreme Court to include "the right to have the jury determine the amount of damages to be awarded" and therefore strict scrutiny may apply); *see also* Wright v. Cent. DuPage Hosp. Assoc., 347 N.E.2d 736 (Ill. 1976) (holding a non-economic damages cap in medical malpractice actions violated plaintiff's due process right as an arbitrary taking of vested rights in property); Kan. Malpractice Victims Coalition v. Bell, 757 P.2d 251, 259, 263-64 (Kan. 1988) (finding caps on recovery and mandatory annuity payments violate the right to jury trial and right to a remedy through due course of law, stating, "means selected have a real and substantial relation to the objective sought . . . . One way to meet due process requirements is through substitute remedies."); Lucas v. United States, 757 S.W.2d 687, 690 (Tex. 1988) (finding statutory limit on damages violates the open courts guarantee, right to "remedy by due course of law" Art. I § 13 of Texas Constitution. Standard used "must be shown that the litigant has a cognizable common law cause of action that is being restricted; second, the litigant must show that the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute.").

117. *Sheward*, 715 N.E.2d at 1069-78. *See also* Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991) (finding $200,000 cap on non-economic damages violates due process).

118. 757 S.W.2d at 690-92.

lower insurance premiums and medical costs. Workmen's compensation schemes were distinguished because they provide a quid pro quo by giving the victim a quicker remedy at law with a lower burden of proof.[119]

Indiana and Louisiana were cited by the *Lucas* court as examples of states that had provided an adequate quid pro quo through the establishment of a patient's compensation fund (PCF).[120] The PCF's are in effect government sponsored excess insurance to which all health care providers pay in each year. Under those systems, recovery from the medical malpractice insurance company or the healthcare provider is capped at one amount, for example $100,000. Once a victim recovers up to the cap from the provider, the PCF then provides additional compensation to a higher amount, for example $750,000. The quid pro quo is that the state guaranteed this excess insurance to the victim. The guarantee of recovery was the essential substitute for full recovery.

b. Upholding caps over state due process challenges.—States that have upheld medical malpractice damages caps over due process challenges have often found there to be a quid pro quo provided by the legislature.[121] The Louisiana Supreme Court in upholding the Louisiana cap and statutory scheme found three benefits that were offered to the most severely injured: "(1) greater likelihood that the offending physician would have malpractice insurance, (2) greater assurance of collection from a solvent fund [through the state sponsored PCF], and (3) payment of all medical care and related benefits."[122] Another adequate quid pro quo has been found through arbitration. The Florida Supreme Court approved a statute imposing caps on non-economic damages in medical malpractice cases where the defendant accepted arbitration.[123] The arbitration

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119. *Id.* at 690 (citing Wright v. Cent. DuPage Hosp. Ass'n, 347 N.E.2d 736, 742 (Ill. 1976)). The Kansas Supreme court also made a distinction to no-fault insurance schemes, "injured patient does not receive prompt payment (as in no-fault insurance) or a reduced burden of proof (as in workers' compensation)," despite the defendant's arguments that quid pro quo was satisfied thru lower-cost and increased, sustained availability of healthcare to the public and guaranteed recovery from insurance. *Bell*, 757 P.2d at 259. *See also* Lakin v. Senco Prods., Inc., 987 P.2d 463, 468-75 (Or. 1999).

120. *Lucas*, 757 S.W.2d at 691 (citing Johnson v. St. Vincent Hosp., 404 N.E.2d 585, 601 (Ind. 1980) (upholding a $500,000 cap on total recovery in medical malpractice actions); Sibley v. Bd of Supervisors, 462 So. 2d 149, 154-8 (La. 1985) (upholding $500,000 cap on non-economic damages in medical malpractice actions)).

121. *See* Fein v. Permanente Med. Group, 695 P.2d 668, 679-82 (Cal. 1985); *Johnson*, 404 N.E.2d at 598-600; Butler v. Flint Goodrich Hosp. of Dillard Univ., 607 So. 2d 517, 518-22 (La. 1992); *see also* Scholz v. Metro. Pathologists, 851 P.2d 901, 907 (Colo. 1993); Adams v. Children's Mercy Hosp., 832 S.W.2d 898, 907 (Mo. 1992); Knowles v. United States, 544 N.W.2d 183, 189-202 (S.D. 1996) (finding no due process violation because due process does not apply to remedies); Pulliam v. Coastal Emergency Serv. of Richmond, Inc., 509 S.E.2d 307, 317-19 (Va. 1999); Robinson v. Charleston Area Med. Ctr., 414 S.E.2d 877 (W. Va. 1991) (finding no due process violation under rational basis test similar to that of equal protection analysis).

122. *Butler*, 607 So.2d at 521.

123. *See* Univ. of Miami v. Echarte, 618 So.2d 189, 194 (Fla. 1993).

was found to provide the plaintiff with the benefit of access to a remedy faster and less expensive than litigation in exchange for the limitation.[124]

Some state courts have been willing to consider the general goals of medical malpractice statutory caps as constituting a sufficient quid pro quo. The Supreme Court of California in *Fein* noted that "it would be difficult to say that the preservation of a viable medical malpractice insurance industry in this state was not an adequate benefit for the detriment the legislation imposes on malpractice plaintiffs."[125]

The Colorado Supreme Court went even further in *Scholz v. Metropolitan Pathologists, P.C.*[126] The *Scholz* court did not even address the issue of a quid pro quo. Rather, that court held that the constitutional guarantee of due process is applicable to rights, not remedies.[127] Therefore, there could be no violation of due process in capping damages as it is merely a remedy afforded to the plaintiff, in contrast to a right to a process to obtain a remedy.[128]

2. Federal Law & Summation.—Here again, the likelihood that a federal court would find a cap on non-economic damages in medical malpractice to be in violation of the due process clause is not very high. However, to the extent there is any risk of such a finding, Congress could ensure the constitutionality of a cap by providing a quid pro quo to plaintiffs in medical malpractice actions. To the extent a quid pro quo is provided the likelihood of an unconstitutional ruling will decrease.

E. Drafting Lessons

While the constitutional challenges that are likely to be raised against a national cap on non-economic damages in medical malpractice actions are of questionable validity, Congress would nonetheless be very wise to draft any proposed cap with these challenges in mind. There are several things that could be done to ensure the constitutionality of a national cap on non-economic damages in medical malpractice actions. It is also important to note that these "drafting lessons" are important ways to ensure, not only that such a cap would surely pass constitutional muster, but also to reach a socially optimal value. Each of these will be discussed in more detail in the subsequent section of this Note to analyze what their overall economic impact to a legislative scheme might be.

1. Make Any Cap Waive-able by the Judiciary.—One way to avoid some of the challenges that arise under the separation of powers and the right to trial by jury could be making any cap that is passed waive-able by the judiciary. Concerns over the right to jury trial and separation of powers may be lowered by allowing the jury to make the determination and leaving the decision up to the

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124. *Id.*

125. 695 P.2d at 681 n.18.

126. 851 P.2d at 907.

127. *Id.*

128. *Id.* (quoting Gibbes v. Zimerman, 290 U.S. 326, 332 (1933)).

judiciary as to whether or not the cap should be appropriately applied to a given case. This was included in a congressional proposal in 1993 and has been advocated for by some commentators.[129]

2. Economic Data—Show a Rational Relationship.—Should the Court decide to apply higher scrutiny than rational basis the legislature will need to have made some explicit findings of the close relationship between high non-economic damage awards and high medical malpractice premiums or overall health care costs depending on the purported goals of any such legislation. The current economic data to support such a relation is at best weak and incomplete. It would assure the likelihood a cap would be found constitutional and bolster support for legislation generally, if congress made specific empirical findings to support any such cap.

3. Narrowly Tailored.—A national cap on non-economic damages in medical malpractice actions would also be more likely to be found constitutional the more narrow the restrictions upon the right to recover are. There are several ways that the effect of any classification could be narrowed. Most notably, the higher the amount of the cap the less narrow the restriction is going to be found, as it will affect less people. There are more creative solutions to narrow the restrictions aside from fluctuations in the amount of the cap. More creative solutions will be discussed in the later sections of this Note and in conjunction with providing a quid pro quo.

4. Quid Pro Quo.—The final drafting lesson we can take from the constitutional analysis of a proposed national cap is that a finding of constitutionality would be more likely if a quid pro quo was provided to plaintiffs for their loss of potential recovery. As previously noted, two potential quid pro quos could be providing faster remedies through arbitration or guaranteed recovery through government sponsored excess insurance.

Whether a national cap on non-economic damages in medical malpractice actions could or should be found constitutional, the likelihood of such a finding can clearly be increased through some drafting considerations. However, any additional features we add to a cap, and indeed a cap in and of itself, must be analyzed for their economic desirability before we reach that point.

III. Expected Economic Effect: Is a National Cap on Non-Economic Damages in Medical Malpractice Actions Economically Desirable?

The actual economic effect of a national cap on damages has increasing relevance to the judicial determination of constitutionality the higher the level of scrutiny that is applied. The economic effect of a national cap needs to be analyzed in terms of the goals that such a statute may purport to achieve, lowering healthcare costs as a whole or lowering malpractice premiums alone. Moreover, just because something is constitutional should not end the inquiry of whether or

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129. Chupkovich, *supra* note 3, at 371-75 (advocating for passage of the Healthcare Liability Reform and Quality of Care Improvement Act of 1992 which would have imposed a national cap on liability with a waiver provision giving discretion to the judiciary).

not it is desirable. Economic analysis of the impact of a national cap on non-economic damages in medical malpractice actions will be a very important tool in determining whether or not to pursue such a cap. It is important to note at the outset of this economic analysis that much of the discussion here is based on empirical data that is old and has relied solely on state experiences. It would serve our national policy-makers well to gather recent empirical information covering a broader spectrum of the nation to make a more well-informed decision on whether or not to pursue a national cap on non-economic damages in medical malpractice actions.

A. Potential Direct Effect on the Healthcare Industry

Statistical and empirical data would suggest that, regardless of a national cap on damages effect on medical malpractice insurance premiums, it is not likely to have an impact on the overall cost of health-care plaguing the country. The effect of a cap on non-economic damages upon medical malpractice insurance alone is a topic of much debate. But, even if a great effect upon malpractice insurance is achieved it is not likely to answer to America's health care woes. The reason for this conclusion is fairly simple. Medical malpractice insurance costs simply are not a large piece of the pie that represents overall health care costs.[130] For example, in 1992, doctors paid five to six billion dollars in premiums while the overall cost of national health care reached 840 billion dollars.[131] That's less than one percent of the total cost of health care that can be attributed to malpractice premiums.[132]

Policy makers should be careful not to represent a national cap on non-economic damages in medical malpractice actions as the answer to America's healthcare woes. Nonetheless, medical malpractice insurance premiums are rising.[133] The effects of these increases can be devastating, just ask the residents of West Virginia, who had to be flown out of state for emergency surgical treatment during the West Virginia Surgeons strike.[134]

B. Effect on Malpractice Insurance Premiums Alone

The theory behind the feasibility of a cap on damages to decrease malpractice

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130. Lucas v. United States, 757 S.W.2d 687 (Tex. 1988); ABA, *supra* note 27.

131. Fran Kirtz, *Medical Malpractice May Ride the New Reform Wave: With Help From AMA and Congress, Exorbitantly High Premiums—and Settlements—Could Come Down*, MED. WORLD NEWS, Apr. 1993, at 70.

132. Larry S. Stewart, *Damage Caps Add to Pain and Suffering*, WASH. TIMES, Nov. 7 1994, at 18 ("Losses paid by insurers in 1991 for medical negligence amounted to only 0.31% of national health care costs.").

133. Knowles v. United States, 544 N.W.2d 183, 190 (S.D. 1996) ("The Hatch Study concluded '[d]espite unchanging claim frequency and declining loss payments and loss expense, on average, physicians paid approximately triple the amount of premiums for medical malpractice insurance in 1987 than in 1982.'").

134. *See supra* note 14.

insurance premiums is based on making risks calculable and minimal. Insurance is concerned with spreading the cost of like events over a large group of people who are at risk of realizing such an event. Insurance premiums therefore must be based on two factors: the probability that an individual may realize the insured event and the amount or value that will be lost if the event is realized.[135] In terms of medical malpractice insurance, riskier fields with higher incidence of malpractice pay higher premiums due to the increased risk on the former factor.[136] The later factor, however, is much more difficult to determine. Damage caps are attempts to both minimize the potential cost of malpractice claims and ease the evaluation of the potential cost in evaluating risk. The more calculable the value of potential risk is, the better an insurance company can make premiums fair in terms of their relation to the insured's actual potential loss. Correspondingly, the lower these calculable risks can be set, the lower the premium should be as well. This should also foster competition between insurers.[137] A non-economic damage cap attempts to both ensure better calculability and minimization of risk. In systems without a cap, the insurance company arguably must account for the risk, however minimal it may be, that a physician could get a very large, potentially boundless, claim against them. The non-economic damages cap makes the risk more calculable and minimized, at least in respect to the non-economic damages portion of the equation. Notably, the overall calculability of risk is still highly difficult to calculate as economic damages will vary in terms of a malpractice victim's future medical expense and lost wages.[138] However, non-economic damages are viewed, at least by proponents of caps, to be most suspect to difficult calculations as jury awards for pain and suffering are most difficult to predict because they are not based on any concrete value of loss and arguably can be irrationally large.[139]

Two simpler rationales behind the theory supporting a non-economic damages caps ability to lower malpractice insurance premiums are that actual payments by insurance companies will be lowered and claim frequency will decrease.[140] Since there will be capped awards for non-economic damages it is

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135. For more detailed economic discussion and further breakdown economically in terms of group premiums versus individual premiums, see Franklin D. Cleckly & Govind Hariharan, *A Free Market Analysis of the Effects of Medical Malpractice Damage Cap Statutes: Can We Afford to Live with Inefficient Doctors?*, 94 W. VA. L. REV. 11, 52-60 (1991).

136. *Id.* at 53.

137. *Id.* at 57.

138. This is a likely cause of the finding in some studies that only caps on total damages resulted in a decrease in malpractice premiums. *See* Gronfein & Kinney, *supra* note 32, at 64-65. An in depth analysis of caps on total damages is beyond the scope of this Note, but would also be a useful tool in constructing the most appropriate legislation in this arena.

139. American Medical Association, *The Medical Liability Crisis: Talking Points*, Jan. 21, 2003, *at* http://www.ama-assn.org/ama/pub/article/9255-7188.html (last visited Mar. 3, 2003); American Osteopathic Association, *Medical Malpractice Liability: A Call for Tort Reform?*, *at* http://www.aoa-net.org/Government/stateaffairs/PLI/tortreform.htm (last visited Nov. 18, 2002).

140. *Id.*

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expected that total payments for claims will be reduced as the amount of awards will be lowered. Hence, as insurance companies are paying out less they will reduce their premiums proportionately. It is also argued that there will be lower overall payouts because claim frequency, or the number of suits brought for malpractice will go down. The theory is that many frivolous suits that are brought in hopes of receiving a large award will not be pursued by plaintiffs because of the decreased likelihood of a substantial windfall for non-economic damages. Nonetheless, these are only theoretical economic effects which we cannot regulate directly.

The available information on the effect state non-economic damages caps have had on their malpractice insurance premiums is varied. Nonetheless, some interesting observations can be made from the available economic information from the state experience that poke some holes in the theoretical arguments in support of a national cap and suggest some concerns to bear in mind in considering alternative solutions.

A 1993 federal government study on tort reform revealed some interesting results concerning the economic impact of damage caps.[141] The study combined the results of six empirical studies assessing the impact of state damage caps.[142] The studies found that caps on total damages, both economic and non-economic, were the most effective of any of the tort reforms analyzed in reducing payment per paid claim and malpractice insurance premiums.[143] However, the results of analysis on non-economic caps alone were mixed: three studies concluded that such caps had a statistically significant effect of decreasing medical malpractice insurance premiums; but, the other three found no measurable impact on reducing premiums.[144] Another interesting finding was that only one of the six studies assessed the effect of damage caps on frequency of claims, finding that the cap had no effect on decreasing claim frequency.[145]

Another useful study on this point compared the status of malpractice insurance premiums and jury verdicts in Indiana, which adopted a cap on damages in medical malpractice actions, to those in Michigan and Ohio which did not.[146] The study revealed that the average jury award in a malpractice case in the state with a cap was actually higher than the states without caps.[147] Insurance

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141. Congressional Assessment, *supra* note 31, at 62-67. This source provides an excellent summary of the background of the medical malpractice crisis and various reforms, a compilation of economic studies analyzing the impact of such reforms, and a very brief discussion of some constitutional implications.

142. *Id.* at 63-65.

143. *Id.* at 64. Among the other tort reforms analyzed for impact on medical malpractice insurance were: statutes of limitations, pretrial screening panels, limits on contingent attorney fees, modifications in the standard of care, allowing reductions of collateral payments, allowing periodic payments, joint and several liability, informed consent, and costs for frivolous suits.

144. *Id.* at 64-65.

145. *Id.* at 65.

146. Gronfein & Kinney, *supra* note 32, at 446-60.

147. *Id.* at 447 (showing mean claim award in Indiana was $404,832, while mean claim

companies and doctors alike were more likely to settle. Furthermore, they were more likely to settle at the price of the cap than below it.[148] As a result, the actual cost that was being paid per claim was higher in the state with a cap than the states without a cap (this will be referred to later as the settlement anomaly). It is also important to note that few cases were awarded at prices greater than the cap in any of the states that were analyzed. Despite this settlement anomaly, Indiana still experienced comparatively low medical malpractice premiums.[149] This would tend to suggest that the ability to calculate risk is actually more important in reducing insurance premiums than actually lowering payouts per claim.

The study did not go further to look at the overall cost to citizens in these states with caps. In Indiana, as in many states, there is also a patients' compensation fund. This is government paid excess insurance. The cost of running such a system is extreme and often pits young inexperienced attorneys against more competent and experienced plaintiffs' attorneys.[150] The cost and effect of running such a system must also be examined.

Several states have found that caps will not reduce their medical malpractice premiums.[151] Most notably, West Virginia, which recently experienced a physician strike, had such a finding. A report of the West Virginia Legislature Committee concluded after a year studying the issue that "any limitations placed on the judicial system (regarding medical malpractice caps, etc.) will have no immediate effect on the cost of liability insurance for health care providers."[152] The conclusions of that study were similar to the experiences of Nevada and Missouri. In Nevada, insurance companies refused to lower doctor's malpractice rates after the enactment of a cap that was supported by the insurance industry in 2002.[153] Missouri also caps damages, but nonetheless, has experienced rises in malpractice premiums though the number of malpractice claims in that state and cost paid per claim have been declining.[154] This implies that even if caps have the actual desired economic effect there must be measures to ensure that it is realized by insurance companies decreasing premiums proportionately.

Many sources have also suggested that insurance rates have risen not as a result of the liability crisis but because of poor management.[155] A 1986 report by

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awards for Michigan and Ohio were $290,022 and $303,220, respectively).

148. *Id.* at 447-48 (showing 27.9% of Indiana claims settled at $500,000, amount of cap in Indiana, whereas only 12.3% in Michigan and 14.1% in Ohio were settled at or above $500,000).

149. *Id.* at 459.

150. *Id.*

151. Press Release, American Trial Lawyers Association: New Bipartisan Study by West Virginia Legislature Confirms Caps in Medical Malpractice Cases Won't Reduce Insurance Rates for Doctors (Jan. 7, 2003), *available at* http://www.ata/prg/ConsumerMedia Resources/Tier3/press_room/medmalpr.aspx (last visited Jan. 17, 2003).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Supra* notes 20-25. Gail Eisland, Note, Miller v. Gilmore: *The Constitutionality of South*

the National Association of Attorney Generals concluded that "insurance premium increases were not related to any purported liability crisis, but 'resulted largely from the insurance industry's own mismanagement.'"[156] While it is unlikely that the entire industry is mismanaged, it is important to note that the industry does enjoy higher profits than comparable insurance sectors.[157] Regardless of whether or not caps on damages are pursued or not, policy makers need to seriously consider increased regulation of medical malpractice insurance rates. Permitting increased rates while the industry is making higher profits than any other comparable insurance sector is not good policy and has the potential to undermine any measures taken to lower rates.

If medical malpractice insurance premiums have had any effect, most sources indicate it has been relatively small.[158] At times, the insurance industry itself has noted that a non-economic damages cap would have little or no effect on reducing insurance premiums.[159] This further bolsters the findings of some state courts that because of the very small number of claims that are awarded above a cap, even before one was in place, it was not rational that it would have the intended effect.[160] In light of these studies, it is no surprise that many states where caps have previously been upheld as constitutional continue to have challenges to their statutes for not achieving their purported goals. For example, in Indiana, one reason for passing a reform was to keep doctors in state, but that effect has not been realized.[161] It is also an important economic implication to note that the likelihood of constitutional challenges arising will also delay the economic

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Dakota's Medical Malpractice Statute of Limitations, 38 SAN DIEGO L. REV. 672, 685 n.121 (1993). For an example of how one medical malpractice insurance company lost money and folded for reasons that had nothing to do with low premium rates or high medical malpractice lawsuit verdicts, see Verba v. Ghaphery, 552 S.E.2d 406, 415-16 (W. Va. 2001) (Starcher, J., dissenting) (citing Barry Hill, *Ponzi Rides Again: The PIE Mutual Story*, WVTLA Advocate (Fall 1998)).

156. Eisland, *supra* note 155, at 685 n.121 (quoting W. John Thomas, *The Medical Malpractice "Crisis": A Critical Examination of a Public Debate*, 65 TEMP. L. REV. 459, 473 (1992) (quoting National Association of Attorney Generals, *An Analysis of the Causes of the Current Crisis of Unavailability and Unaffordability of Liability Insurance* (1986))).

157. Larry S. Stewart, *Damage Caps Add to Pain and Suffering*, WASH. TIMES, Nov. 7, 1994, at 18 ("[M]edical malpractice as a line of insurance had the highest profit as a percentage of premiums in 1991.").

158. U.S. GAO, *Medical Malpractice: Effects of Varying Laws in the District of Columbia, Maryland, and Virginia*, (1999).

159. State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062, 1092 (Ohio 1999) (citing "a 1987 study by the Insurance Service Organization, the rate-setting arm of the insurance industry, found that the savings from various tort reforms, including a $250,000 cap on noneconomic damages, were 'marginal to nonexistent'").

160. Lucas v. United States, 757 S.W.2d 687, 691 (Tex. 1988) (citing an independent study that showed that less than 0.6% of all claims brought were for more than $100,000).

161. BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1993, at 122 (1994). The rate of physicians per 100,000 residents in Indiana is 165, while the national average is 224.

impact of any reform taking place. If the constitutionality of a reform is put into question then the risk calculations engaged in by insurance companies will retain a large level of uncertainty.

A final key consideration of the potential economic impact of a national cap is the effect to which its effectiveness would increase due to its scope. Analysis of the effectiveness or ineffectiveness of state experiences with caps have considered one key factor to be that many malpractice insurers serve a national or regional market. The effect of caps in one state alone may not have much effectiveness on the rate-setting activity of a company with a national or regional scope. The effect that a national cap may have on these companies has not been the subject of much empirical study. This is another area that congress needs to examine in order to make a wise policy choice in this area.

C. Other Economic Effects on Society as a Whole

There are several other potential indirect economic effects that require examination and analysis. First, let us examine the aforementioned Settlement Anomaly a bit closer. At first glance, the fact that states with caps are having more settlements at the level of the cap resulting in higher overall payments per claim seems to suggest that, overall victims of malpractice are being compensated more under these schemes in a less costly system, as litigation is likely to be more expensive than settlements. A closer look reveals a more disturbing result. The increase of settlements is likely to increase the disparity of compensation between victims of minor injuries and severe injuries. Those with minor injuries are likely to be overcompensated as insurance companies have an incentive to get out of what could be lengthy and costly litigation to settle at a slightly higher price. But, those with very high non-economic damages from severe injury will still get the cap as well. The inequity between these two classes is increased as the severely injured is left at the same level of undercompensation while the victim with minor damages is over-compensated.

A second troubling effect of the settlement anomaly is the likelihood of increased costs to society as a whole. Part of what makes the settlement anomaly work is that insurance companies are let out at a very low level of liability and to get up to the overall cap of the injury the victim then goes through litigation with a state excess insurance fund. Now we have traded costs to the medical malpractice insurance company for the cost of resources used by a state agency which will often have to go to litigation for a determination of the total jury award that should be rewarded. Instead of the doctors who have committed malpractice and their insurance companies paying for the litigation, now the state must take up those costs. The costs of state run systems of excess insurance must be analyzed, in order to completely address this scheme.

Another concern is the extent to which a national cap will still serve the goals of tort law, to compensate the injured and deter negligent conduct. Medical malpractice caps on non-economic damages do neither. Negligent conduct of physicians is deterred less and compensation to victims of tragic malpractice is also decreased. The risk of suffering a high jury verdict in a case of malpractice, on an economic level, deters a higher level of malpractice than a capped level of

liability will.[162] The insurance industry has argued that verdicts that are too high can cause doctors to engage in defensive medicine, ordering unnecessary procedures to rule out maladies that the doctor would not normally consider. They argue that these defensive medicine costs increase health insurance costs and medical costs to society. The economic data in this area of deterrence is primarily speculative and incomplete. But, it is the opinion of this author that in having to choose between increased costs for overprotective versus underprotective practices, society is much better off in taking the overprotective route and ensuring the health and safety of the nation's people.

IV. ALTERNATIVES: POTENTIAL TO SOLVE THE PROBLEM AND RETAIN COMPENSATION

Certainly, the questions of the constitutionality and economic impact of a national cap on non-economic damages in medical malpractice actions should be enough to bring policy-makers to ask, "Are there any better solutions to the problem of increasing medical malpractice premiums?" Many creative solutions may be likely to achieve the goals of a national cap on non-economic damages without solely burdening the severely injured, or at least providing them better compensation, and thereby avoiding much of the constitutional and economic debate surrounding proposals for a national cap on non-economic damages in medical malpractice actions. Alternative solutions need to be investigated before a national cap is declared the solution to the nation's healthcare problems. Many of the alternatives here could be used in conjunction with each other and/or a cap on non-economic damages and some states have done so. Further, it is important that each of these proposals presents its own questions of constitutionality and economic desirability that should be explored, but do not fall within the scope of this Note.

A. Loser Pays—Limiting Frivolous Cases Without Punishing the Most Severely Injured

One key focus of advocates for caps is that frivolous lawsuits are the cause of the rise in costs. Discouraging frivolous lawsuits might more effectively be achieved by forcing the losing party to pay their opponents attorney fees. Fees can be exorbitant in medical malpractice cases, largely due to the high cost of providing expert medical testimony at trial.[163] Requiring attorneys fees to be paid by a losing plaintiff would cause plaintiffs attorneys to filter out frivolous claims, particularly those of the poor whom cannot indemnify the attorney for legal fees in preparation of the case. However, this opens the door to another room filled with constitutional challenges. One way to limit both the potential for disparity

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162. Wachsman, *supra* note 18.

163. In many states costs are also excessive due to the lengthy period of time it takes to work a medical malpractice case through the legal process, which may involve a pre-trial medical screening panel, litigation or settlement with the party being sued, and litigation or settlement with a state excess insurance fund.

due to wealth of plaintiffs and burdening the plaintiff who had a trial worthy claim, but merely lost at trial, from paying fees is by making the assessment of attorney fees to the losing plaintiff judicially determinable. It may be best for a judge to be able to make the determination of what is or is not a frivolous case and assess fees accordingly.

B. Periodic Payments—Easing the Burden of Large Awards

Another way we could ease the burden on insurance companies lessening their payments paid per claim per year thereby, theoretically, leading to lower premiums is to allow them to pay the victim over time, dividing the award out over their remaining life expectancy. Permitting insurance companies to pay plaintiffs receiving large awards through periodic payments could lessen the impact of a large verdict being assessed against a particular company.[164] Here again there are also constitutional challenges. But, by limiting the payment of an award to only those that meet a predetermined level and giving those plaintiffs greater assurance that they will receive full compensation the likelihood of a constitutional ruling invalidating such a system should be minimized.

C. Fully Utilizing the Judiciary's Powers of Remittitur and Additur and Waive-able Caps

Caps that are waive-able at the discretion of the judiciary are one alternative. Such a cap was proposed to Congress in 1992, but failed to pass.[165] A large focus of groups advocating non-economic damages caps is that they are simply irrational and excessive jury awards.[166] If that is truly the case, then the judiciary may be the best place to determine when such has occurred. "Rather than focusing on the size of jury awards, the emphasis should be on whether juries award appropriate levels of damages relative to plaintiffs' injuries."[167] The implication is perhaps one less of a need for a cap and more a need for increased importance of the judiciary exercising the power of remittitur. The establishment of a national cap that is waive-able would allow the judiciary room to waive the cap where the case warrants it. By making the cap the norm and requiring judicial discretion to permit an award above it, the likelihood of successful constitutional challenges on right to trial by jury, separation of powers, and due process grounds will be greatly decreased. Nonetheless, this may not fully achieve lowering medical malpractice insurance rates as one of the key causes of high rates, as previously discussed, is an account for risk—the more the insurance company can know the better they can account for risks. The industry is not likely to gain much more risk calculability under a waive-able cap. If irrational jury determinations are really the focus of proponents of such a cap, this is a good alternative. However, if the goal is to reduce malpractice insurance premiums a

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164. *See* Wachsman, *supra* note 18, at 323-24.

165. *See* Chupkovich, *supra* note 3.

166. *See* Chamallas, *supra* note 16.

167. O'Connor, *supra* note 52, at 114.

waive-able cap does not appear to be a very good solution.

D. Scheduling—Making Risk Calculable Yet Permitting Compensation

One way the legislature could make risks more calculable for insurance companies yet provided adequate compensation for victims of malpractice could be through scheduling.[168] There is a wealth of data in this country from previous jury awards as to what appropriate values of compensation for pain and suffering from different acts of malpractice may be. Using this data combined with expert opinion the legislature could establish some scheduling standards for different types of injury. Certainly, the legislature has been able to determine similar values in criminal law through the assessment of fines and sentences for imprisonment, and perhaps such legislation is warranted here. If most of our worry is that juries are giving excessive awards, the legislature can attempt to quantify what an appropriate award for different types of injuries would be. This could be a combination of factors including the type of injury and the duration for which the victim must live with the impact of the condition.

Insurance companies would be able to account for the risks of different types of injuries that occur by using the schedule in combination with the likelihood of the particular injury resulting from malpractice as a function of a physician's specialty and clientele. Risk assessment is key to the insurance industry, almost more so than the amount of the potential award. Nonetheless, through scheduling both value and risk assessment can be taken into account in such a manner that victims of the most severe acts of malpractice will still be compensated at a legislatively predetermined level.

E. PCF—The Potential for Government Subsidization to Regulate Insurance Industry Management

As radical an idea as scheduling for injury in malpractice may be, an even more dynamic solution could be government subsidization. As previously noted, part of what has made many programs that have passed state constitutional muster successful has been the establishment of a state excess insurance fund thereby providing victims of malpractice a quid pro quo for the potential loss of complete compensation.[169] A national PCF could be a potential component of any medical malpractice liability reform.[170] Moreover, this could be used on a national level, to curb concerns of industry mismanagement undermining the scheme of the statutory structure. One such scheme could provide that if an insurance company

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168. For further explanation of this alternative, see Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908 (1989).

169. *See supra* note 120 (discussing cases where state caps upheld due to quid pro quo provided thru PCF).

170. A step beyond some national subsidization would be a move towards a no-fault medical liability system. This is beyond the scope of this Note. For such a proposal, see David M. Studdert & Troyen A. Brennan, *Toward a Workable Model of "No-Fault" Compensation for Medical Injury in the United States*, 27 AM. J.L. & MED. 225 (2001).

is reaping more of a profit than a government declared industry average and an excessive award is granted against them, then the government will not subsidize the company in the event of a large award. However, if an insurance company is charging fair rates and reaping moderate profits, then if they take a hit the government could share the cost with them. This way we would not have blind acceptance of insurance companies keeping large profits, nor would we have blind burdening of the most severely injured victims of malpractice. Further, the extent to which society would have to pick up the bill to help victims of malpractice would only be where extremely necessary, not every instance where someone is victimized by malpractice in a severe manner, but a small subset of those where the malpractice insurer is operating within government standards.

CONCLUSION

The specter that those who suffer the greatest pain and suffering from severe acts of medical malpractice, like Gilford Tyler,[171] will pay the price for doctors and insurance companies nationwide to receive decreased liability is growing. While it is likely that Congress would not violate the federal constitution in passing such a national cap on non-economic damages, the economic desirability of such a cap is very suspect. Nonetheless, if such a cap is not carefully drafted it is likely to be subject to constitutional challenges which could slow and subvert the effect of its implementation. Furthermore, a national cap on non-economic damages that is not carefully drafted opens the door for the potential, albeit unlikely, for the Supreme Court to find such a cap to violate various constitutional protections. Congress would be very wise and best serve the nation by seeking out economic data to provide support for any such cap. Moreover, the importance of the constitutional rights and economic consequences that such a cap implicates warrant careful consideration of alternatives that might better achieve the goals of proponents of caps on non-economic damages while not burdening only the most severely injured victims of medical malpractice.

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171. American Trail Lawyers Association, *supra* note 1.

TABLE 1: BREAKDOWN OF STATE CONSTITUTIONALITY OF CAPS ON NON-ECONOMIC DAMAGES FOR MEDICAL MALPRACTICE (as of 5/16/03)	
Number of States Finding Caps Unconstitutional	8
Number of States Finding Caps Constitutional	17
Number of States with a Cap but No Ruling	5
Number of States with Neither a Cap nor a Ruling	20

TABLE 2: SUMMARY OF STATE CONSTITUTIONAL RULINGS ON DAMAGES CAPS AFFECTING MEDICAL MALPRACTICE ACTIONS
(as of 5/16/03)

STATE CAPS RULED UNCONSTITUTIONAL

STATE	CAP DESCRIPTION & COVERAGE			RIGHT(S) VIOLATED
	AMOUNT	DAMAGES	ACTIONS	
Alabama[172]	$400,000	Non-Economic Only	Medical Malpractice	Trial by Jury, Equal Protection Clause
Florida[173]	$450,000	Non-Economic Only	Medical Malpractice	Open Courts Provision
Illinois[174]	$500,000	Non-Economic Only	Common Law Actions for Death, Bodily Injury & Property Damage	Separation of Powers, Special Legislation
New Hampshire[175]	$250,000/ $875,000	Non-Economic Only	Medical Malpractice/All Personal Injury	Equal Protection Clause
Ohio[176]	$250,000- $1,000,000	Non-Economic Only	Any Tort Action	Due Process Clause

172. Moore v. Mobile Infirmary Ass'n, 592 So. 2d 156 (Ala. 1992).

173. Smith v. Dep't of Ins., 507 So. 2d 1080 (Fl. 1987); $250,000 cap on non-economic damages only where both parties submit to arbitration. FL. STAT. § 766.207.

174. Best v. Taylor Mach. Works, 689 N.E.2d 1057 (Ill. 1997).

175. Brannigan v. Usitalo, 587 A.2d 1232 (N.H. 1991), *aff'g* Carson v. Maurer, 424 A.2d 825 (N.H. 1980).

176. State *ex rel.* Ohio Acad. of Trial Lawyers v. Sheward, 715 N.E.2d 1062 (Ohio 1999); Morris v. Savoy, 576 N.E.2d 765 (Ohio 1991).

Oregon[177]	$500,000	Non-Economic Only	All Personal Injury	Trial by Jury
Texas[178]	$500,000	All but Medical Expenses - Including Future Expenses	Medical Malpractice Including Wrongful Death	Open Courts Provision
Washington[179]	43% ave. annual wage for life	Non-Economic Only	All Personal Injury and Wrongful Death	Trial by Jury
STATE CAPS UPHELD AS CONSTITUTIONAL				
STATE	CAP DESCRIPTION & COVERAGE			RIGHT(S) NOT VIOLATED
	AMOUNT	DAMAGES	ACTIONS	
Alaska[180]	$400,000	Non-Economic Only	Any Personal Injury or Wrongful Death Claim	Trial by Jury, Equal Protection Clause, Due Process, Separation of Powers, Open Courts, Special Legislation
California[181]	$250,000	Non-Economic Damages	Any Action Against Any Health Care Provider	Equal Protection, Due Process
Colorado[182]	$1,000,000	Total Recovery	Medical Malpractice	Due Process, Equal Protection Clause

177. Lakin v. Senco Prods., Inc., 987 P.2d 463, 476 (Or. 1999).

178. Lucas v. United States, 757 S.W.2d 687 (Tex. 1988).

179. Sofie v. Fibreboard Corp., 771 P.2d 711 (Wash. 1989).

180. ALASKA STAT. § 09.17.010 (2003); Evans v. State, 56 P.3d 1046 (Alaska 2002).

181. CAL. CIV. CODE § 3333.2 (2004); Fein v. Permanente Med. Group, 695 P.2d 668 (Cal. 1985).

182. COLO. REV. STAT. § 13-64-302(1) (2003); Scholz v. Metro. Pathologist, 851 P.2d 901 (Colo. 2003).

Idaho[183]	$400,000	Non-Economic	All Tort Actions	Trial by Jury, Special Legislation, Separation of Powers
Indiana[184]	$1,250,000	Total Recovery	Medical Malpractice Including Wrongful Death	State and Federal Due Process and Equal Protection, State Rights and Privileges, Trial by Jury
Kansas[185]	$250,000	Non-Economic Only	All Tort Actions	Trial by Jury, Reparation After Due Process Equal Protection
Louisiana[186]	$500,000	Non-Economic Only	Medical Malpractice	State & Federal Equal Protection Clause
Maryland[187]	$500,000+	Non-Economic Only	All Personal Injury	Equal Protection, Trial by Jury, Open Courts
Missouri[188]	$350,000+	Non-Economic Only	Medical Malpractice Including Wrongful Death	State and Federal Equal Protection, Trial by Jury, Open Court, Certain Remedy, Due Process

183. IDAHO CODE § 6-1603 (2003); Kirkland v. Blair County Med. Ctr., 4 P.3d 1115 (Idaho 2000).

184. IND. CODE ANN. § 34-18-14-3 (2003); Johnson v. St. Vincent Hosp., 404 N.E.2d 585 (Ind. 1980).

185. KAN. STAT. ANN. § 60-19a02 (2003). Non economic cap previously struck down in *Kansas Malpractice Victims Coalition v. Bell*, 757 P.2d 251 (Kan. 1988)

186. LA. REV. STAT. ANN. § 40:1299.42 (2001); Butler v. Flint Goodrich Hosp. of Dillard Univ., 607 So. 2d 517 (La. 1992).

187. MD. CODE ANN., CTS. & JUD. PROC. § 11-108 (2002); Murphy v. Edmonds, 601 A.2d 102 (Md. 1992).

188. MO. REV. STAT. § 538.210 (2000); Adams v. Children's Mercy Hosp., 832 S.W.2d 898 (Mo. 1992).

Montana[189]	$250,000	Non-Economic Only	Medical Malpractice	Right to Full Remedy and Equal Protection
Nebraska[190]	$1,250,000	Overall	Medical Malpractice	Trial by Jury, Due Process, Separation of Power
New Mexico[191]	$600,000	All but Medical Expenses	All Tort Actions	Access to Courts, Equal Protection
North Dakota[192]	$500,000	Non-Economic Only	Medical Malpractice	Equal Protection, Trial by Jury
South Dakota[193]	$500,000	Non-Economic Only	Medical Malpractice	Procedural Due Process, Trial by Jury, Open Courts
Virginia[194]	$1,500,000+	Total Recovery	Medical Malpractice Including Wrongful Death	Trial by Jury, Special Legislation, Taking of Property, Due Process or Equal Protection, Separation of Powers
West Virginia[195]	$250,000/ $500,000/ $1,000,000	Non-Economic Only	Medical Malpractice	Equal Protection, Separation of Powers

189. MONT. CODE ANN. § 25-9-411 (2003); Meech v. Hillhaven West, Inc., 776 P.2d 488 (Mont. 1989) (discussing cap on wrongful death damages).

190. NEB. REV. STAT. § 44-2825; Gourley v. Neb. Methodist Health Sys., Inc., 663 N.W.2d 43 (Neb. 2003).

191. N.M. STAT. ANN. § 41-5-6 (2003); Trujillo v. City of Albuquerque, 965 P.2d 305 (N.M. 1998).

192. N.D. CENT. CODE § 32-62-02 (2003); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978).

193. S.D. CODIFIED LAWS ANN. § 21-3-11 (2003); Knowles v. United States, 544 N.W.2d 183 (S.D. 1996).

194. VA. CODE ANN. § 8.01-581.15 (2003); Pulliam v. Coastal Emergency Servs., Inc., 509 S.E.2d 307 (Va. 1999).

195. W. VA. CODE § 55-7B-8 (2003); Robinson v. Charleston Area Med. Ctr., 414 S.E.2d 877 (W. Va. 1991).

Wisconsin[196]	$350,000+	Non-Economic Only	Medical Malpractice	Trial by Jury, Separation of Powers, Remedy, Equal Protection, Due Process
The constitutionality of caps in Hawaii, Massachusetts, Michigan, Montana, and Utah have not been ruled on.[197]				
Arizona and Wyoming have constitutional provisions prohibiting the enactment of any law limiting damages recoverable for personal injury and/or death.				
The following states have neither a statutory cap nor a constitutional provision explicitly prohibiting them: Arkansas, Connecticut, Delaware, District of Columbia, Georgia, Iowa, Kentucky, Maine, Minnesota, Mississippi, Nevada, New Jersey, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, and Vermont.				

196. WIS. STAT. §§ 893.55, 665.017 (2003); Guzman v. St. Francis Hosp., Inc., 623 N.W.2d 776 (Wis. App. 2000), *rev. denied*, 629 N.W.2d 783 (Wis. 2001).

197. HAW. REV. STAT. §§ 663-8.7, 663-10.9; MASS. ANN. LAWS ch. 231, § 60H, ch. 229 § 2 (2000); Mich. Comp. Laws § 600.1483; UTAH CODE ANN. §§ 78-14-7.1, 78-14-3 (2003). The Massachusetts cap is often not problematic for plaintiffs because it allows juries to give higher awards where they find certain special circumstances so warranting such. For a detailed discussion of Michigan's Medical Malpractice Cap in which the author calls for the Michigan Supreme Court to find the cap unconstitutional, see John P. Desmond, *Michigan's Medical Malpractice Reform Revisited—Tighter Damage Caps and Arbitration Provisions*, 11 T.M. COOLEY L. REV. 159 (1994). While the current Utah cap has not been ruled on, a previous attempt was struck down in *Condemarin v. University Hospital*, 775 P.2d 348 (Utah 1989).

SHAKING *PRICE WATERHOUSE*: SUGGESTIONS FOR A MORE WORKABLE APPROACH TO TITLE VIII MIXED MOTIVE DISPARATE TREATMENT DISCRIMINATION CLAIMS

CASSANDRA A. GILES*

INTRODUCTION

In 1968, Congress enacted Title VIII of the Civil Rights Act of 1968 for the express purpose of providing fair housing and eliminating discrimination in housing on the basis of race, color, religion, and national origin.[1] In applying Title VIII, courts often have looked to Title VII of the Civil Rights Act of 1964[2] for interpretation as mandated by the Supreme Court; thus, developments and applications of employment discrimination law have a great effect on Title VIII housing discrimination law.[3]

Bringing a claim of discrimination for employment or housing can be a cumbersome undertaking. Not only has the plaintiff suffered the indignity of being denied employment or housing through little or no fault of her own, but she also faces the daunting task of proving that her employer, landlord, or lender had an impermissible reason for depriving her of a home or livelihood. This task becomes even more difficult when the defendant can point to a legitimate reason to justify its course of action, yet still has an underlying impermissible reason for making its ultimate decision. For example, a landlord may have a legitimate concern about a prospective tenant's ability to make rental payments, but ultimately decide not to rent to the tenant because she has children, or because she is a minority. Such action constitutes mixed motive discrimination.

This particular area of housing and employment discrimination law has experienced much change and development in recent years. The main source of the debate over how to analyze cases of mixed motive discrimination has been

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1. 42 U.S.C. § 3604 (2003). A provision making discrimination on the basis of sex illegal was added in 1974; provisions for handicap and familial status were added in 1988 by the Fair Housing Amendments Act of 1988.

2. 42 U.S.C. § 2000e-17 (2003).

3. The Supreme Court and several lower courts have relied on Title VII precedents to interpret Title VIII. *See* DiCenso v. H.U.D., 96 F.2d 1004, 1008-09 (7th Cir. 1996); Huntington Branch of the N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 935 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988); Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights, 558 F.2d 1283, 1288-89 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); Trafficante v. Metro. Life Ins. Co., 409 U.S. 205 (1972). *See generally* ROBERT SCHWEMM, HOUSING DISCRIMINATION LAW AND LITIGATION § 7:4 (2001).

the 1989 Supreme Court decision in *Price Waterhouse v. Hopkins*.[4] In this Title VII case, the Court in a plurality opinion determined that a defendant employer could avoid liability for discrimination under Title VII by proving that it would have made the same decision even if it had not taken the plaintiff's status as a member of a protected group, in this case gender, into account.[5] Although Congress responded to this "liability loophole" through a provision in the 1991 Civil Rights Act dealing with mixed motive discrimination under Title VII,[6] there has still been a question as to whether and how *Price Waterhouse* applies to mixed motive claims in employment and housing discrimination law.

One particular area of concern deals with Justice Sandra Day O'Connor's concurring opinion in *Price Waterhouse* and how "direct evidence" factors into a plaintiff's evidentiary burden. According to Justice O'Connor's opinion, a showing of direct evidence would be necessary to trigger a mixed motive analysis and shift the burden of persuasion to the defendant to show that he would have made the same decision absent the discriminatory motive.[7] If the plaintiff fails to meet this evidentiary threshold, a court would then analyze the case under the *McDonnell Douglas/Burdine*[8] pretext analysis in which the defendant has the burden of production and most articulate a legitimate reason for its adverse employment decision, and the plaintiff retains the burden of persuasion to convince the finder of fact that the defendant's proffered reason is pretextual.[9] Justice O'Connor's analysis has been viewed as the concurrence issued on the narrowest grounds, and thus has been viewed as part of the "rule" from *Price Waterhouse*.[10]

There has been much debate, and therefore inconsistency, in how the different courts interpret and apply this "direct evidence" requirement, given that Justice O'Connor did not define in her concurring opinion what constituted "direct evidence."[11] Some courts have stated that it is of a certain type, such as noncircumstantial, while others have interpreted it as being of certain intensity, such as blatant or substantial.[12] In August 2002, the Ninth Circuit in *Costa v. Desert Palace, Inc.*[13] decided to take an alternative approach to the question of whether *Price Waterhouse* is applicable to Title VII mixed motive claims.

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4. 490 U.S. 228 (1989).

5. *Id.* at 258.

6. 42 U.S.C. § 2000e-(2)(m) (2003); *id.* § 2000e-5(g)(2)(B).

7. *Price Waterhouse*, 490 U.S. at 277 (O'Connor, J. concurring).

8. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981).

9. *Price Waterhouse*, 490 U.S. at 270-71 (O'Connor, J. concurring).

10. Joseph J. Ward, *A Call for Price Waterhouse II: The Legacy of Justice O'Connor's Direct Evidence Requirement for Mixed-Motive Employment Discrimination Claims*, 61 ALB. L. REV. 627, 648 (1997).

11. Christopher Chen, *Rethinking the Direct Evidence Requirement: A Suggested Approach in Analyzing Mixed-Motive Discrimination Claims*, 86 CORNELL L. REV. 899, 908 (2001).

12. *Id.* at 908-13.

13. 299 F.3d 838 (9th Cir. 2002), *aff'd*, 123 S. Ct. 2148 (2003).

Instead of weighing in on the debate as to how to apply the "direct evidence" requirement from Justice O'Connor's concurring opinion in *Price Waterhouse*, the Ninth Circuit took a major departure and determined that *Price Waterhouse* had no bearing on the new statutory scheme as amended by the 1991 Civil Rights Act. The Ninth Circuit held that the Title VII amendment places no special or heightened evidentiary burden on the plaintiff in mixed motive cases.[14] While this case is only one viewpoint amongst the other twelve circuits, it is an interesting development in that the Ninth Circuit chose not to enter the debate over different evidentiary approaches, but rather sidestepped what it called "a quagmire that defies characterization."[15] The court determined that Congress never intended to impose a heightened evidentiary burden on plaintiffs, and that the courts should simply adhere to the statutory language of the 1991 amendment.[16]

The Ninth Circuit's decision in *Costa* raises interesting questions not only regarding how *Price Waterhouse* should apply to Title VII jurisprudence, but also how it should apply to Title VIII mixed motive cases. The Supreme Court has addressed mixed motive discrimination in the context of the Equal Protection Clause of the Fourteenth Amendment; however, it has yet to address the issue of "mixed motive" discrimination in a disparate treatment case under Title VIII.[17] There is a discrepancy between how Title VIII mixed motive cases were analyzed prior to and post-*Price Waterhouse*, and also discrepancy over what impact the 1991 Civil Rights Act had on Title VIII mixed motive cases. This Note sets forth the proposition that the Ninth Circuit in *Costa* has taken the correct approach in fully abandoning *Price Waterhouse* in mixed motive employment discrimination cases, and conversely this approach should also apply to Title VIII mixed motive cases. The Supreme Court's affirmance of the Ninth Circuit's decision in *Desert Palace, Inc. v. Costa*[18] further bolsters this proposition and sets the stage for a

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14. *Id.* at 851.

15. *Id.*

16. *Id.*

17. *See* SCHWEMM, *supra* note 3, § 10-22. The Supreme Court considered mixed motive discrimination in housing based on the Equal Protection Clause of the Fourteenth Amendment in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) (Arlington Heights I). While the court held that proof of discriminatory intent is required to make out a violation of the Equal Protection Clause, the Court's opinion acknowledged that a defendant may act with more than one purpose—both discriminatory and non-discriminatory. In these instances, proof that the defendant was motivated in part by a discriminatory purpose was to shift the burden to the defendant to show that the same decision would have been made absent consideration of the impermissible purpose. If the defendant could meet this burden, there would be no violation of the Equal Protection Clause and the defendant would prevail. This two step approach to mixed motive discrimination cases under the Equal Protection Clause was suggested by two Justices in *Price Waterhouse,* Justice O'Connor and Justice White, but neither the plurality opinion nor the dissent agreed with this approach. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

18. 123 S. Ct. 2148 (2003).

change in the approach to Title VIII mixed motive cases.

Part I of this Note discusses the development of mixed motive discrimination analysis under Title VII, from *Price Waterhouse* to the application of the new statutory scheme under the Civil Rights Act of 1991. Part II discusses the development of mixed motive discrimination under Title VIII, both prior to and after *Price Waterhouse*. Part III describes the Ninth Circuit's approach to mixed motive discrimination in *Costa v. Desert Palace, Inc.* and explains why this is a more workable approach to mixed motive discrimination analyses than the framework established by *Price Waterhouse*. Finally, Part IV addresses how mixed motive claims should be resolved under Title VIII in light of the Ninth Circuit's approach in *Costa*.

I. THE MIXED MOTIVE "QUAGMIRE"

In the years since *Price Waterhouse* and the 1991 Civil Rights Act, circuit courts of appeal have been struggling to apply a mixed motive analysis in light of the *Price Waterhouse* decision and the 1991 Act. Much of the problem has arisen from Justice O'Connor's concurring opinion in which she refers to "direct evidence" as being the standard for triggering a mixed motive analysis, as opposed to analyzing the claim under a *McDonnell Douglas/Burdine* pretext analysis.[19] The resulting jurisprudence has thus been described as "a quagmire that defies characterization"[20] and has resulted in an inconsistent application of mixed motive claims under Title VII.

A. Development of Mixed Motive Under Title VII— Price Waterhouse v. Hopkins

In 1989, the Supreme Court decided *Price Waterhouse v. Hopkins*, a Title VII employment discrimination case. The plaintiff, Ann Hopkins, was a senior manager at Price Waterhouse, a nationwide professional accounting partnership.[21] Hopkins was the only female candidate proposed for partnership in 1982 out of the eighty-eight persons proposed for partnership.[22] Hopkins received mixed reviews concerning her candidacy for partnership—she was praised for being instrumental in securing a $25 million contract with the Department of State, for being an "outstanding professional," and for being "extremely competent [and] intelligent."[23] However, she was also criticized about her interpersonal skills, being described as "unduly harsh, difficult to work with and impatient with staff."[24]

The Court found, however, that part of the impetus for the negative evaluations was the fact that Hopkins was a woman. Some of the comments from

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19. *Price Waterhouse*, 490 U.S. at 278.
20. *Costa*, 299 F.3d at 851.
21. *Price Waterhouse*, 490 U.S. at 232-33.
22. *Id.* at 233.
23. *Id.* at 234.
24. *Id.* at 235.

partners considering her candidacy stated that she acted "macho," that she "overcompensated for being a woman," and that she was advised to "take a course in charm school."[25] The comment that the Court called the *coup de grace* came from the partner charged with informing Hopkins of the decision to place her candidacy on hold until the following year: she was told that, in order to improve her chances for partnership, Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[26]

In analyzing Hopkins' case, the Court made the distinction between two types of intentional discrimination cases for purposes of Title VII.[27] The first involves "pretext" discrimination cases, analyzed according to the Supreme Court's opinions in *McDonnell Douglas Corp. v. Green*[28] and *Texas Department of Community Affairs v. Burdine*,[29] in which a defendant has offered a legitimate rationale for the allegedly discriminatory act. In these types of cases, the issue is whether the unlawful consideration or legitimate consideration was actually the basis for the action.[30] Under this analysis, it is presumed that there was a single reason motivating the employment action, and it is left to the jury to determine whether the plaintiff's proffered reason or the defendant's was the true reason for the employment decision.[31]

"Mixed motive" discrimination, on the other hand, deals with situations in which the evidence shows that the defendant used *both* legitimate and illegitimate considerations in making a decision.[32] The Court determined in *Price Waterhouse* that the prima facie approach to "pretext" cases under the *McDonnell Douglas/Burdine* framework was not appropriate for evaluating "mixed motive" cases.[33] Under the "mixed motive" analysis articulated by the plurality opinion in *Price Waterhouse*, the plaintiff's burden of proof is satisfied if the evidence shows that the employer relied on any unlawful considerations in making its decision,[34] and consideration of the employee's gender played a motivating part in the employment decision.[35] The burden of persuasion then shifts to the defendant to show that the employer would have made the same

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25. *Id.*

26. *Id.*

27. *See* SCHWEMM, *supra* note 3, at 10-21.

28. 411 U.S. 792 (1973).

29. 450 U.S. 248 (1981).

30. SCHWEMM, *supra* note 3, at 10-20.

31. Ward, *supra* note 10, at 635.

32. *Id.*

33. SCHWEMM, *supra* note 3, at 10-21. Under *McDonnell Douglas* and *Burdine*, once the plaintiff established the prima facie case, the defendant employer had the burden of production to articulate a legitimate, non-discriminatory reason for the adverse employment action. The burden of persuasion remained with the plaintiff to show that the proffered reason was merely pretext. Price Waterhouse v. Hopkins, 490 U.S. 228, 270 (1989) (O'Connor, J. concurring).

34. *Price Waterhouse*, 490 U.S. at 241-42 (1989) (plurality opinion).

35. *Id.* at 244.

decision if it had not taken the illegitimate factor into account.[36] The employer would not be held liable if it satisfied its burden of persuasion on the "same decision" issue, which the plurality characterized as an affirmative defense.[37]

The basic difference between the *McDonnell Douglas/Burdine* pretext framework and the *Price Waterhouse* mixed motive framework is the shift of the burden of persuasion to the defendant. The mixed motive framework has been characterized as more "plaintiff friendly" because "[P]laintiffs enjoy more favorable standards of liability in mixed motive [employment discrimination] cases than in pretext cases."[38] The plaintiff does not have to prove that the legitimate reason proffered by the defendant is not the true reason for the adverse employment decision, but instead is only required to prove that a discriminatory reason motivated the employer's decision in order to satisfy its burden.

Essentially, *Price Waterhouse* allowed employers to escape liability in mixed motive discrimination cases by showing that a legitimate reason motivated the employment decision, regardless of whether the employer also took race, gender, or any other impermissible reason into account. While the plaintiff could have proven that the employer did have an illegitimate and illegal reason under Title VII for making the employment decision, the legitimate motive served to defeat the plaintiff's claim.

B. Congress's Response to Price Waterhouse*—The Civil Rights Act of 1991*

The Supreme Court's decision in *Price Waterhouse* limited the remedies available to plaintiffs who had been wronged by discrimination. Although the Court acknowledged that an illegitimate discriminatory factor motivated the employer's decision, it nevertheless provided a way for the employer to avoid liability altogether despite proof of its discriminatory action. In response to this limitation on the redressability of civil rights violations, the Civil Rights Act of 1990 was introduced, which eventually became the Civil Rights Act of 1991.[39] This amendment to Title VII of the Civil Rights Act of 1964 overruled the basic premise that an employer could avoid liability by showing that it would have made the same decision absent the consideration of an unlawful factor.[40] The amendment was introduced in response to the *Price Waterhouse* and other Title VII decisions in order to target "the Supreme Court's recent decisions by restoring the civil rights protections that were dramatically limited by those

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36. *Id.* at 242-45.

37. *Id.* at 246. Although the plurality characterizes this burden as an affirmative defense, there is no practical difference between what the plurality calls an "affirmative defense" and what the concurring and dissenting opinions call a "burden shift." *Id.* at 269 (O'Connor, J. concurring) and 286 (Kennedy, J. and Scalia, C.J. dissenting) (characterizing the "affirmative defense" description as "nothing more than a label").

38. Ward, *supra* note 10, at 637-38 (citing Fuller v. Phipps, 67 F.3d 1137, 1141 (4th Cir. 1995)).

39. Costa v. Desert Palace, Inc., 299 F.3d 838, 850 (9th Cir. 2002).

40. *Id.*

decisions."[41]

The Civil Rights Act of 1991 was not a complete rejection of the analysis articulated in *Price Waterhouse*, but rather altered what the employer would be held liable for if there were a showing of discriminatory and non-discriminatory factors motivating its action. The Civil Rights Act of 1991 codifies the "motivating factor" test of *Price Waterhouse,*[42] but changed its liability component.[43] Section 107(a) of the 1991 Civil Rights Act Amendment provides that "an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors motivated the practice."[44] Section 107(b) presents the appropriate remedy where a defendant successfully proves that it would have made the same decision absent the discriminatory motivation.[45] A showing that the employer would have made the same decision absent the discriminatory factor affects only the scope of remedies, not liability.[46] If the employer can show that it would have made the same decision regardless of consideration of the illegitimate factor, the plaintiff would be limited to the remedies of declaratory relief, injunctive relief, and attorney's fees;[47] but may not be awarded damages or an order requiring admission, reinstatement, promotion, or payment.[48] Thus, the Civil Rights Act of 1991 expressly overruled the basic premise that an employer could avoid all liability under Title VII by establishing that it would have made the same decision absent the discrimination.[49]

C. The "Direct Evidence" Evidentiary Trigger

Congress's swift action to "overturn *Price Waterhouse*" with the Civil Rights Act of 1991 did not completely render the opinion irrelevant to the application of employment discrimination law under the revised statutory scheme. One issue that is not specifically addressed in the Title VII amendment is in what

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41. H.R. CONF. REP. NO. 101-856, at 1 (1990).

42. The plurality opinion stated that "[i]n saying that gender played a motivating part in an employment decision, we mean that, if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman." *Price Waterhouse*, 490 U.S. at 250.

43. 42 U.S.C. § 2000e-2(m) (2003); *id.* § 2000e-5(g)(2)(B).

44. *Id.* § 2000e-2(m).

45. *Id.* § 2000e-5(g)(2)(B).

46. *Costa*, 299 F.3d at 850. 42 U.S.C. § 2000e-5(g)(2)(B) (2003), which are the enforcement provisions, modified the liability component so that the court "may grant declaratory relief, injunctive relief . . . and attorney's fees and costs," *id.* § 2000e-5(g)(2)(B)(i), despite employer's showing that it "would have taken the same action in the absence of the impermissible motivating factor," *id.* § 2000e-5(g)2(B). *See also* Chen, *supra* note 11 at 907.

47. 42 U.S.C. § 2000e-5(g)(2)(B)(i) (2003).

48. *Id.* § 2000e-5(g)(2)(B)(ii).

49. *Costa*, 299 F.3d at 850.

circumstances should courts apply a mixed motive analysis versus a pretext analysis. To answer this question, courts have looked to *Price Waterhouse*, and until recently there was great discord amongst the circuits as to how to make this determination.

Price Waterhouse did not have a majority opinion, and thus what is binding precedent from the case was determined by joining the plurality opinion with one of the two concurring opinions issued by Justice O'Connor and Justice White.[50] Justice O'Connor's concurrence discussed the level of proof that a plaintiff would be required to show in order to proceed under a mixed motive framework more directly that Justice White's concurrence; thus, the "rule" from *Price Waterhouse* includes Justice O'Connor's evidentiary trigger requirement.[51]

1. Justice O'Connor's Mixed Motive Analysis: The Origin of "Direct Evidence".—Making the determination of whether to apply a *McDonnell Douglas/Burdine* pretext analysis or a *Price Waterhouse* mixed motive analysis lies in the type of evidence that the plaintiff is required to produce to support a claim of discriminatory intent[52] and determines whether the burden of persuasion shifts to the defendant or remains with the plaintiff. In a mixed motive case, the plaintiff is required to produce "direct evidence" of discrimination, which is a higher evidentiary standard than is required in a pretext analysis.[53] The requirement of direct evidence stems from Justice O'Connor's concurring opinion in *Price Waterhouse*.[54] Justice O'Connor's view was that the basic framework from *McDonnell Douglas* should be retained, but supplemented by a presentation of "direct evidence of discriminatory animus in the decisional process."[55] The burden of persuasion would then shift to the defendant to prove that it had a legitimate, non-discriminatory reason for the employment decision.[56]

According to Justice O'Connor, the trial court would not have to determine at the outset of the case whether the claim should be analyzed as a pretext case or a mixed motive case; rather, once all the evidence has been presented by the plaintiff and defendant, at this point the court would determine whether the *McDonnell Douglas* or *Price Waterhouse* framework should apply.[57] If the plaintiff fails to meet the heightened standard of direct evidence required for a mixed motive analysis, the case would be decided under the *McDonnell Douglas/Burdine* pretext framework, which would leave the defendant with a lower burden—the burden of production—in offering a non-discriminatory reason for its decision.[58] The plaintiff would be left with the burden of persuasion as to the ultimate issue of whether the employer's decision was based

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50. Ward, *supra* note 10, at 648.
51. *Id.*
52. *Id.* at 636.
53. *Id.*
54. Price Waterhouse v. Hopkins, 490 U.S. 228, 276-78 (1989) (O'Connor, J. concurring).
55. *Id.* at 278.
56. *Id.*
57. *Id.*
58. *Id.*

on a discriminatory factor.[59] If the plaintiff does successfully meet its burden of persuasion to warrant the application of a *Price Waterhouse* mixed motive analysis—that is, she produces direct evidence of a discriminatory purpose—the burden of persuasion shifts to the defendant to show that "sufficient business reasons would have induced it to take the same employment action."[60]

Since the determination of whether a case is a mixed motive or pretext case hinges upon whether the plaintiff can produce direct evidence of discriminatory purpose or whether the plaintiff is left to rely on proving the prima facie case under *McDonnell Douglas*, the characterization of a case as either of these two types is somewhat misleading.[61] A "single motive" pretext case may actually involve multiple considerations, both legitimate and illegitimate; conversely, a case analyzed under a "mixed motive" framework may actually only involve one motive that turns out to be discriminatory. Individuals, and particularly multi-person decision making bodies, rarely make a decision based upon only one consideration; thus it would be reasonable to presume that most discrimination cases do involve mixed motives. However, based on *Price Waterhouse*, a case is analyzed under one of these two frameworks solely based on whether the plaintiff has been privy to information that will constitute direct evidence of discriminatory motive.[62]

2. Application of the "Direct Evidence" Requirement Under the 1991 Civil Rights Act.—Although the 1991 Civil Rights Act overruled the basic premise of *Price Waterhouse* in its approach to determining employer liability when discriminatory reasons were a factor in an employment decision, Justice O'Connor's direct evidence requirement had been used by many courts as the threshold for triggering a mixed motive analysis[63] and a finding of liability under Title VII as amended by the 1991 Civil Rights Act.[64] Justice O'Connor's opinion concerning the requirement that direct evidence be presented in order to trigger a mixed motive analysis was relevant under the 1991 Act because her concurrence in *Price Waterhouse* specifically addressed the level of proof

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59. *Id.* at 278-79.

60. *Id.* at 276-77.

61. Ward, *supra* note 10, at 637.

62. *Id.*

63. Chen, *supra* note 11, at 908. There are some courts that disagree with the requirement of direct evidence to trigger a mixed motive analysis. The Eighth Circuit, stated that:

> there is no restriction on the *type* of evidence a plaintiff may produce to demonstrate that an illegitimate criterion was a motivating factor in the challenged employment decision. The plaintiff need only present evidence, be it direct or circumstantial, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the challenged decision.

Stacks v. Southwestern Bell Yellow Pages, Inc., 996 F.2d 200, 202 n.1 (8th Cir. 1993). *See also* Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1183-85 (2d Cir. 1992) ("direct evidence" was not a requirement imposed by the majority, and requiring direct evidence "as a precondition to shifting into the mixed-motives analysis runs afoul of more general evidentiary principles").

64. 42 U.S.C.A. § 2000e-2(m) (2003).

necessary before a plaintiff may proceed under a mixed motive framework.[65] However, the problem faced by the lower courts lies in the fact that Justice O'Connor failed to clearly define what constitutes direct evidence.

In her analysis, Justice O'Connor stated that the plaintiff in *Price Waterhouse*, Ann Hopkins, did show by direct evidence that "decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision."[66] However, it is possible to characterize this evidence as somewhat circumstantial, particularly considering that part of the evidence included testimony from a social psychologist regarding her opinion of Hopkins' evaluations.[67] The social scientist testified that the sharply critical remarks in Hopkins' evaluations were likely the product of sex-stereotyping, although "she could not say with certainty whether any particular comment was the result of stereotyping."[68] How "direct" this evidence is may be open to debate, thus the uncertainty as to what Justice O'Connor meant by "direct evidence" has resulted in inconsistent applications of mixed motive employment discrimination claims.

a. Three approaches to "direct evidence".—There are three main positions that the various circuits have taken in defining what constitutes "direct evidence" for employment discrimination cases—the "classic" position, the "animus plus" position, and the "animus" position.[69] The "classic" position derives its definition of "direct evidence" from the dictionary.[70] "[T]he term signifies evidence, which, if believed, suffices to prove the fact of discriminatory animus without inference, presumption, or resort to other evidence."[71] The Fifth and Tenth Circuits consistently use the approach, and other circuits use it periodically.[72]

The "animus plus" position defines "direct evidence" as "evidence, both direct and circumstantial, of conduct or statements that (1) reflect directly the alleged discriminatory animus and (2) bear squarely on the contested employment decision."[73] Essentially, the triggering of the mixed motive analysis depends on the strength of the plaintiff's case.[74] This requirement to trigger a mixed motive analysis is more than what would be ordinarily required for an inference of discrimination to be permissible.[75] This position has been utilized

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65. Ward, *supra* note 10, at 648.

66. Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J. concurring).

67. *Id.* at 235-36.

68. *Id.* at 236.

69. Fernandez v. Costa Bros. Masonry, 199 F.3d 572, 582 (1st Cir. 1999).

70. *Id.*

71. *Id. See* Shorter v. ICG Holdings, Inc., 188 F.3d 1204, 1207 (10th Cir. 1999); Haas v. ADVO Sys., Inc., 168 F.3d 1508 (5th Cir. 1999).

72. *Fernandez*, 199 F.3d at 582. *See* Laderach v. U-Haul of Northwestern Ohio, 207 F.3d 825, 829 (6th Cir. 2000); Nichols v. Loral Vought Sys. Corp., 81 F.3d 38, 40 (5th Cir. 1996).

73. *Fernandez*, 199 F.3d at 582. *See* Taylor v. Virginia Union Univ., 193 F.3d 219, 232 (4th Cir. 1999).

74. *Fernandez*, 199 F.3d at 582. *See* Fuller v. Phipps, 67 F.3d 1137, 1143 (4th Cir.1995).

75. *Costa*, 299 F.3d at 852.

by the First, Fourth, D.C., Ninth,[76] and Third Circuits.[77]

The "Animus" position states that "as long as the evidence (whether direct or circumstantial) is tied to the alleged discriminatory animus, it need not bear squarely on the challenged employment decision."[78] This position has been utilized by the Second Circuit, and the Eighth Circuit has intermittently taken this stance.[79]

b. Intra-circuit splits.—The confusion over what constitutes "direct evidence" goes beyond disputes amongst the various circuits. In addition to the inter-circuit splits concerning what defines "direct evidence," there have also been intra-circuit splits.[80] The First Circuit in 1999 in *Fernandez v. Costa Bros. Masonry*[81] utilized the "animus plus" position, yet three years later applied the "classic" position in *Weston-Smith v. Cooley Dickinson Hospital*.[82] The Eleventh Circuit originally allowed "'broad statements' of discriminatory attitude" to satisfy the requirements of "direct evidence,"[83] but later determined that only statements related to the decision making process were sufficient to satisfy the requirements of "direct evidence."[84] Another intra-circuit split has occurred in the Second Circuit, which held shortly after the 1991 Civil Rights Amendment in *Tyler v. Bethlehem Steel Corp.*,[85] that direct evidence meant evidence sufficient to permit the trier of fact to conclude that an illegitimate factor was a motive in the challenged decision.[86] Yet, a few months later the same court held that the plaintiffs are required to present "evidence of conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude."[87] Finally, the Tenth Circuit initially declined to impose a heightened "direct evidence" requirement,[88] but six months later the court did impose a "direct evidence" requirement.[89]

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76. However, the Ninth Circuit in *Costa v. Desert Palace, Inc.* rejects Judge Selya's characterization of the Ninth Circuit's approach as "animus plus." *Id.* at 852 n.3.

77. *Fernandez*, 199 F.3d at 582.

78. *Id. See* Lightfoot v. Union Carbide Corp., 110 F.3d 898, 913 (2d Cir. 1997).

79. *Fernandez*, 199 F.3d at 582. *See* Kerns v. Capital Graphics, Inc., 178 F.3d 1011, 1017-18 (8th Cir. 1999).

80. *Costa*, 299 F.3d at 852. *See also* Wright v. Southland Corp., 187 F.3d 1287, 1294 (11th Cir. 1991) (in which the court recognized intra-circuit splits).

81. 199 F.3d 572, 580 (1st Cir. 1999).

82. 282 F.3d 60, 64 (1st Cir. 2002).

83. Burrell v. Bd. of Trs. of Ga. Military Coll., 125 F.3d 1390, 1394 n.7 (11th Cir. 1997).

84. Bass v. Bd. County Comm., 256 F.3d 1095, 1105 (11th Cir. 2001). *See also Costa*, 299 F.3d at 853.

85. 958 F.2d 1176, 1185 (2d Cir. 1992).

86. *Id.*

87. Ostrowski v. Atl. Mut. Ins. Cos., 968 F.2d 171, 182 (2d Cir. 1992).

88. Medlock v. Ortho Biotech, Inc., 164 F.3d 545, 553 (10th Cir. 1999) ("A mixed motive instruction is . . . appropriate in any case, where the evidence is sufficient to allow a trier of fact to find both forbidden and permissible motives.") (quoting *Ostrowski*, 968 F.2d at 181).

89. Shorter v. ICG Holdings, Inc., 188 F.3d 1204, 1207 (10th Cir. 1999) (imposing the

Needless to say, the only conclusion that can be drawn from comparisons of the positions of the various circuits is that the courts have not been able to determine a satisfactory definition of "direct evidence" for employment discrimination, which has resulted in inconsistent applications of Title VII. Although most courts require direct evidence to determine whether a mixed motive analysis should apply, the differing definitions of what constitutes direct evidence have rendered the standard meaningless.

II. MIXED MOTIVE CLAIMS IN TITLE VIII JURISPRUDENCE

The confusion concerning how to apply *Price Waterhouse* to mixed motive claims under Title VII has also had an impact on mixed motive claims under Title VIII. Title VIII has long been interpreted in light of Title VII precedents.[90] The burden of proof analysis articulated in *McDonnell Douglas* and *Burdine* have been widely applied in Title VIII pretext cases and is virtually identical to the analysis under Title VII.[91] One method of establishing a prima facie case under the Fair Housing Act is for the plaintiff to show that (1) she is a member of a racial minority or other protected class; (2) she applied for and was qualified to rent an apartment or townhome of the defendant; (3) she was denied the opportunity to rent, inspect, or negotiate for the rental of the unit; and (4) the housing opportunity remained available.[92] The specific elements of *McDonnell Douglas* are not required to make out the prima facie case, and a plaintiff may meet its burden by offering evidence adequate to create an inference that an adverse decision was based on a discriminatory criterion illegal under Title VII or Title VIII.[93] Once the plaintiff proves her prima facie case, the burden of production shifts to the defendant to show that the refusal to rent or negotiate was motivated by legitimate considerations.[94] Once the defendant brings forth evidence of non-discriminatory reasons for its decision, the burden of production

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classic position and excluding "statements of personal opinion, even when reflecting a personal bias"). *See also Costa*, 299 F.3d at 853.

90. SCHWEMM, *supra* note 3, at 7-7. *See e.g.* Trafficante v. Metro. Live. Ins. Co., 409 U.S. 205 (1972); Dicesno v. HUD, 96 F.3d 1004, 1008-9 (7th Cir. 1996); Pfaff v. HUD, 88 F.3d 739, 745 & n.1 (9th Cir. 1996); Huntington Branch of the N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 935 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988); Metropolitan Hous. Dev. Corp. v. Vill. of Arlington Heights, 588 F.2d 1283, 1288-89 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978); United States v. West Peachtree Tenth Corp., 437 F.2d 221, 226-27 (5th Cir. 1971).

91. Ashbury v. Brougham, 866 F.2d 1276, 1279 (10th Cir. 1989). *See also* Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1038 (2d Cir. 1979).

92. *Ashbury*, 866 F.2d at 1279.

93. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 358 (1977) (Title VII decision); Pinchback v. Armistead Homes Corp., 907 F.2d 1447 (4th Cir. 1990), *cert. denied*, 498 U.S. 983 (1990) (Title VIII decision) (holding where discrimination is proved directly, the *McDonnell Douglas* test is inapplicable).

94. *Ashbury*, 866 F.2d at 1279.

shifts back to the plaintiff to show that the proffered reasons were pretextual.[95]

In the context of mixed motive discrimination, Justice O'Conner's concurring opinion in *Price Waterhouse* interpreting the term "because of . . . sex" in 42 U.S.C. § 2000e(a)(2) has been used in interpreting the language "because of [protected status]" in the Fair Housing Act.[96] "Both Title VII and Title VIII proscribe conduct which is taken 'because of' listed prohibited factors,"[97] so courts have found it proper to interpret the statutes similarly. In addition, the direct evidence mixed motive trigger articulated by Justice O'Connor also applies to Title VIII mixed motive claims.[98] Thus, courts looking to Title VII precedent to interpret when to apply a mixed motive framework in a Title VIII claim will have to contend with the inconsistencies and confusion existing amongst the various circuits.

A. Title VIII Jurisprudence Prior to Price Waterhouse

Price Waterhouse caused a sharp departure from previous mixed motive housing discrimination claims. In the two decades preceding *Price Waterhouse*, the lower courts had developed a strong consensus that the Fair Housing Act is violated even if only one of the factors that motivated the defendant was unlawful.[99] Appellate decisions after 1970 agreed that a defendant need not be motivated by unlawful considerations, and by 1980 there were no Title VIII claims rejected where it was established that race was a partial reason for an adverse housing decision.[100]

One of the earliest decisions regarding this point is *Smith v. Sol D. Adler Realty Co.*,[101] where the Seventh Circuit held a defendant liable where he had a valid, nonracial excuse for rejecting the plaintiff as a tenant, but also did not want to rent to her based on her race.[102] The *Adler* opinion held that "race is an impermissible factor in an apartment rental decision and that it cannot be brushed aside because it was neither the *sole* reason for discrimination nor the total factor of discrimination. We find no acceptable place in the law for partial racial discrimination."[103] The case was brought under the Civil Rights Act of 1866[104] and the Fair Housing Act, but was decided on the basis of the former.[105] The Seventh Circuit later applied this legal standard to Title VIII, stating in *Moore v.*

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95. *Id.* Under the *McDonnell Douglas/Burdine* analysis, the burden of persuasion always remains with the plaintiff.

96. Blaz v. Barberton Garden Apartments, 972 F.2d 346 (6th Cir. 1992).

97. H.U.D. v. Denton II, 1992 WL 406537, at *8 (H.U.D.A.L.J.).

98. H.U.D. v. Denton I, 1991 WL 442794, at *8 (H.U.D.A.L.J.).

99. SCHWEMM, *supra* note 3, at 10-22.

100. *Id.* §§ 10-23, 10-24.

101. 436 F.2d 344 (7th Cir. 1970).

102. *Id.* at 349.

103. *Id.* at 349-50.

104. 42 U.S.C. § 1982 (2003).

105. *Adler*, 436 F.2d at 349.

Townsend[106] that "it need only be established that race played some part in the refusal to deal."[107]

All appellate decisions after *Adler* and prior to *Price Waterhouse* held that a violation of the Fair Housing Act may be established where race is but one consideration relied on by the defendant.[108] While the appellate decisions did not state the standard exactly the same way as the Seventh Circuit in *Adler*, there was a general consensus that a plaintiff did not have to show that the defendant was motivated solely by unlawful considerations to establish discrimination.[109]

B. Effect of Price Waterhouse *on Title VIII Mixed Motive Claims*

Only after the decision in *Price Waterhouse*, an "employment" discrimination case, did a change occur to limit the liability imposed on defendants who considered discriminatory reasons in making housing decisions. The application of the *Price Waterhouse* analysis for determining liability in mixed motive cases essentially allowed defendants in housing discrimination cases to avoid liability where they could show that the illegitimate factor was only a partial reason for the denial of housing, so long as they could show that they would have made the same decision absent the illegitimate factor.[110] These post-*Price Waterhouse* decisions regarding mixed motive housing discrimination marked a departure from previous Title VIII litigation that followed the general consensus that the Fair Housing Act was violated even if only one of the factors that motivated the defendant's housing decision was unlawful.[111]

C. Effect of the Civil Rights Act of 1991on Title VIII

The *Price Waterhouse* mixed motive analysis still remains fully applicable for Fair Housing Act cases despite the 1991 amendment to Title VII.[112] However, unlike its application under the new statutory scheme of the 1991 Civil

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106. 525 F.2d 482 (7th Cir. 1975).

107. *Id.* at 485.

108. SCHWEMM, *supra* note 3, at 10-23. *See, e.g.*, Hanson v. Veterans Admin., 800 F.2d 1381, 1386 (5th Cir. 1986) (Title VIII is violated if race "was a consideration and played some role in the real estate transaction"); Jordan v. Dellway Villa of Tenn., Ltd., 661 F.2d 588, 594 (6th Cir. 1981) (plaintiff should recover if race "played a part" in his rejection of housing); Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1042-43 (2d Cir. 1979) (Title VIII is violated if race "is even one of the motivating factors," and considerations of race must not "play any role in the decision to deny [plaintiff's] application"); United States v. Pelzer Realty Co., Inc., 484 F.2d 438, 443 (5th Cir. 1973) (race need only be "one significant factor" that the defendant considered in order to find liability).

109. SCHWEMM, *supra* note 3, at 10-24.

110. Cato v. Jilek, 779 F. Supp. 937, 944 (N.D. Ill. 1991).

111. SCHWEMM, *supra* note 3, at 10-22.

112. *Cato*, 779 F. Supp. at 943 n.19 (acknowledging that the "undiluted *Price Waterhouse* standard continues to control in Title VIII 'mixed-motive' cases" despite the Civil Rights Act of 1991).

Rights Act, courts have allowed this analysis to reach the same result in *Price Waterhouse*, not only requiring direct evidence to trigger a mixed motive analysis, but allowing the defendant to escape liability upon a showing that a legitimate factor motivated a housing decision.[113]

This point is illustrated in *HUD v. Denton I*, in which the administrative law judge ("ALJ") determined that showing that an illegal consideration, such as race or gender, played a motivating part in the defendant's decision must be based on direct evidence, and the framework for examining such evidence is established by *Price Waterhouse*.[114] The ALJ went on to determine that the defendant may avoid liability altogether by proving that it would have made the same decision even if it had not allowed the illegitimate factor to play a part in the housing decision.[115] The ALJ in *Denton II* further explained that this was due to the fact that "because of" language in the Fair Housing Act should be interpreted similar to its interpretation in *Price Waterhouse*.[116] The ALJ in *Denton II* dismissed the argument that the Civil Rights Act of 1991 overruled *Price Waterhouse* and effectively rendered the law under Title VII irrelevant to Title VIII, instead determining that section 107(m) of the Civil Rights Act of 1991 amends only Title VII, not Title VIII.[117]

Although Congress overruled the result of *Price Waterhouse*, the ALJ stated that "the Civil Rights Act of 1991 did not address the *Price Waterhouse* Court's analysis for determining liability in a mixed motive case where the language of a statute proscribes conduct 'because of' certain unlawful factors."[118] Thus, although Congress sought to remedy the perceived evils of *Price Waterhouse*, courts in applying Title VIII are still using this case to determine liability in mixed motive housing discrimination cases. The inconsistent applications of *Price Waterhouse* to Title VII and Title VIII should be a major concern to civil rights advocates, and goes against the widely accepted principle that the two statutes should be interpreted similarly.

III. *COSTA V. DESERT PALACE INC.*—A MORE WORKABLE APPROACH TO TITLE VII MIXED MOTIVE CASES

In an August 2002 decision, the Ninth Circuit decided an employment discrimination case which effectively abandoned the direct evidence requirement for Title VII disparate treatment cases, thus effectively abandoning all traces of *Price Waterhouse* from mixed motive disparate treatment analyses for Title VII.

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113. *Id.* at 944.

114. H.U.D. v. Denton I, 1991 WL 442794 *8 (H.U.D.A.L.J.).

115. *Id. See also Cato*, 779 F. Supp. at 933-44 (stating "[T]he defendant may avoid a finding of liability only by proving by a preponderance of the evidence that it would have made the same [housing] decision even if it had not taken the plaintiff's gender into account.").

116. H.U.D. v. Denton II, 1992 WL 406537 *8 (H.U.D.A.L.J.).

117. *Id. See Cato*, 779 F. Supp. at 943 n.19.

118. *Id.*

In *Costa v. Desert Palace, Inc.*,[119] the employer, Caesars Palace Hotel and Casino, terminated Catharina Costa, the only woman in her bargaining unit.[120] The employer cited disciplinary problems, including tardiness, absences, and altercations with fellow employees.[121] However, Costa proved that she was disciplined more harshly and more often than her male counterparts for similar infractions: that she was singled out for reprimand; that she was assigned a disproportionately lower amount of overtime; and that she was penalized for failure to conform to "sexual stereotypes."[122] The jury determined that sex had been a motivating factor in Costa's termination and, because Caesars did not establish that she would have been terminated without consideration of her gender, awarded back pay and compensatory and punitive damages.[123]

On appeal, Caesars argued that Costa should have been held to a special, higher standard of "direct evidence" in order to trigger the mixed motive analysis, as established by the Supreme Court in *Price Waterhouse*, and claimed that she did not meet this threshold.[124] However, the Ninth Circuit disagreed with Caesars and determined that "Title VII imposes no special or heightened evidentiary burden on a plaintiff in a so-called 'mixed-motive' case."[125]

A. Reasons for Abandoning "Direct Evidence" for Title VII

The Ninth Circuit Court of Appeals in *Costa* criticized the applicability of Justice O'Connor's reference to "direct evidence" to the Civil Rights Act of 1991, noting the inconsistent characterization of the term by various courts and commentators.[126] Instead of adopting one of the three approaches to direct evidence—"classic," "animus plus," or "animus"[127]—the Court looked to the language of the statute and the congressional intent of the 1991 Act to determine that there is no requirement of direct evidence or any other special or heightened proof burdens for mixed motive discrimination cases.[128]

1. Statutory Interpretation.—The Ninth Circuit in *Costa* reasoned that the best way to resolve the problems associated with characterizing "direct evidence" was to return to the language of the statute, which does not impose any special evidentiary requirements for mixed motive claims[129] and does not reference "direct evidence."[130] In other words, the debate over what constitutes "direct

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119. 299 F.3d 838 (9th Cir. 2002).
120. *Id.* at 844.
121. *Id.* at 845-46.
122. *Id.*
123. *Id.* at 846.
124. *Id.* at 844.
125. *Id.*
126. *Id.* at 851.
127. *See supra* notes 69-79 and accompanying text.
128. *Costa*, 299 F.3d at 851.
129. *Id.* at 844.
130. *Id.* at 853.

evidence" for the purpose of Title VII is irrelevant because the statute does not require direct evidence.

The Ninth Circuit took the approach that "no special . . . proof hurdles may be [judicially] imposed on Title VII plaintiffs."[131] The most relevant case cited by the Court of Appeals is *Onacle v. Sundowner Offshore Services, Inc.*,[132] in which the Supreme Court determined that the same methods of proof used in opposite sex sexual harassment claims could also be used in same sex sexual harassment claims, rejecting the heightened evidentiary requirement that lower courts had imposed on the latter type of cases.[133]

2. Congressional Intent and Legislative History of the Civil Rights Act of 1991.—Another important factor that the Ninth Circuit utilizes to determine that there should be no "direct evidence" requirement is congressional intent in passing the 1991 Civil Rights Act.[134] In the House Report accompanying the 1991 Civil Rights Act, the Committee determined that recent decisions of the Supreme Court, including *Price Waterhouse*, had "cut back dramatically on the scope and effectiveness of civil rights protections" and that "existing protections and remedies under Federal law [were] not adequate to deter unlawful discrimination or to compensate victims of such discrimination."[135] The stated purpose of the Civil Rights Act of 1991 was to "restore civil rights protections" that had been limited by the recent Supreme Court decisions and to "*strengthen* existing protections and remedies available under federal civil rights laws" in order to provide "more effective deterrence and adequate compensation for victims of discrimination."[136] The House Report specifically includes a section discussing Section 203 of the Act entitled "The Need to Overturn *Price Waterhouse*."[137] Although the House Report primarily discusses the dramatic limitation that *Price Waterhouse* imposed in finding liability where an employer had a discriminatory reason for an employment decision, the report also stresses the important interests at stake in proper enforcement of Title VII. The House Report further declares that "[i]t is in the interest of American society as a whole to assure that equality of opportunity in the workplace is not polluted by unlawful discrimination. Even the smallest victory advances that interest."[138] The report also states that limitations on liability for mixed motive disparate treatment discrimination would greatly hinder effectuation of the purpose of Title VII ban on discrimination on the basis of race, color, religion, sex, or national origin, because mixed motive factual scenarios are quite common.[139]

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131. *Id.* at 851.

132. 523 U.S. 75 (1998).

133. *Id.* at 80-81.

134. *Costa*, 299 F.3d at 850.

135. H.R. REP. NO. 102-40(I), at *4 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549.

136. H.R. REP. NO. 102-40(II), at *1 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549 (emphasis added).

137. H.R. REP. NO. 102-40(I), at *45.

138. *Id.* at *47.

139. *Id.*

In the report's explanation of Section 203[140] and Section 703(1),[141] there was no mention of a requirement that the plaintiff show "direct evidence" of discriminatory purpose. Specifically, the Committee states "[t]o establish liability under proposed Section 703(1), the complaining party must demonstrate that discrimination actually contributed or was otherwise a factor in an employment decision or action. . . . [T]he Committee intends to restore the rule applied in many federal circuits *prior to the* Price Waterhouse *decision.*"[142] It appears from the House Report that Congress did not intend to incorporate any portion of the *Price Waterhouse* opinion into the new statutory scheme and intended to restore the rule concerning mixed motive discrimination that existed "*prior to*" *Price Waterhouse*, not "in light of" *Price Waterhouse.* In addition to Congress's desire to restore protections limited by *Price Waterhouse*, the legislature also sought to strengthen such protections.[143] Placing the additional requirement of a showing of "direct evidence" of discriminatory motive on the part of the employer seems inapposite to the desire of Congress to strengthen and restore protections to victims of employment discrimination.

B. Evidentiary Framework Used by the Ninth Circuit for Mixed Motive Cases

The evidentiary framework utilized by the Ninth Circuit to determine whether there has been a violation of Title VII's ban on mixed motive discrimination employed an analysis that was devoid of the "direct evidence" requirement. The court required only that "the plaintiff in any Title VII case may establish a violation through a preponderance of the evidence (whether direct or circumstantial) that a protected characteristic played a 'motivating factor.'"[144] The court noted that "circumstantial evidence is not inherently less probative than direct evidence"[145] and that circumstantial evidence may be weighed on the same scale and may be put before the jury in the same manner as direct evidence.[146] The Ninth Circuit's view is that determinations of liability should be left to the jury, no matter what the characterization of the evidence may be.

The Ninth Circuit's notion that direct evidence is not required to trigger a mixed motive analysis seems to collapse the distinction between mixed motive claims and pretext claims. Rather, the court makes the persuasive argument that "all of these concepts coexist without conflict."[147] The court notes that the *McDonnell Douglas* analysis is a separate inquiry that occurs at an earlier stage involving summary judgment, while a mixed motive analysis arises later in the

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140. 42 U.S.C.A. § 2000e-2(m) (2003).

141. *Id.* § 2000e-5(g).

142. H.R. REP. NO. 102-40(I), at *48 (emphasis added).

143. *See supra* note 136 and accompanying text.

144. Costa v. Desert Palace Inc., 299 F.3d 838, 853-54 (9th Cir. 2002).

145. *Id.* at 854 n.4 (citing United States v. Cruz, 536 F.2d 1264, 1266 (9th Cir. 1976)).

146. *Id.* (citing United States v. King, 552 F.2d 833, 845 (9th Cir. 1976)).

147. *Id.* at 854.

litigation at the jury instruction phase.[148] The Ninth Circuit insists that the two inquiries are separate and may coexist. The *McDonnell Douglas* analysis is necessary only to survive the summary judgment phase, and evidence found during discovery and produced at trial may lead to the conclusion that the case is actually one involving mixed motives.

According to the Ninth Circuit, the proper method for determining whether to provide a mixed motive instruction to the jury would be left to the discretion of the trial judge based on all of the evidence presented at trial. If the trial court

> determines that the only reasonable conclusion a jury could reach is that the discriminatory animus is the *sole* cause for the challenged employment action or that discrimination played no role at all . . . then the jury should be instructed to determine whether the challenged action was taken "because of" the prohibited reason.[149]

If the jury determines that the employer acted because of discriminatory intent, and this was the only reason for the adverse employment decision, the employee would prevail and would receive the full remedies afforded under Title VII,[150] including injunction, reinstatement or hiring of employees, without or without back pay, or any other appropriate equitable relief.[151] If the jury finds that the employer did not act because of discriminatory intent, the employer will prevail.[152]

In contrast, if the trial judge determines that the evidence, whether direct or circumstantial, could support a finding that discrimination is but one of multiple factors in the challenged employment decision, it would be proper for the trial judge to give a mixed motive instruction to the jury. The trial judge should then instruct the jury to determine whether the discriminatory reason was a motivating factor in the challenged employment action.[153] If the jury finds that the discriminatory reason was a motivating factor, then the employer has violated Title VII.[154] However, the jury must then determine whether the employer would have made the same decision absent the discriminatory factor. If the jury determines that the employer has proved by a preponderance of the evidence that it would have made the same decision absent the discriminatory reason, the employer will be still be held liable under Title VII, but the remedies available to the plaintiff will be limited to "attorney's fees, declaratory relief, and an order prohibiting future discriminatory actions."[155]

The Ninth Circuit's analysis in *Costa* also resolves the problem of characterizing cases according to "mixed motive" versus "single motive." As

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148. *Id.* at 865.
149. *Id.* at 856.
150. *Id.*
151. 42 U.S.C. § 2000e-5(g)(1) (2003).
152. *Costa*, 299 F.3d at 856.
153. *Id.*
154. *Id.*
155. *Id.* at 857. *See* 42 U.S.C. § 2000-e(g)(2)(B) (2003).

noted above, in following the distinction established by *Price Waterhouse*, the determination of whether a case was single motive or mixed motive hinged primarily on whether the plaintiff could produce direct evidence of discrimination, not whether the defendant was actually motivated by a single motive or multiple motives.[156] Under the Ninth Circuit's method of analysis, determining whether a case is single motive or mixed motive depends on the type of evidence offered and whether that evidence could support a finding that a single reason motivated the employment decision, or whether it is plausible that the employer had multiple considerations weighing on its decision. This is a more logical approach to mixed motive claims since it is more relevant to what actually occurred in the employment decision—the employer took legitimate and illegitimate considerations into account—and is not based on an ambiguous "direct evidence" requirement.

The Supreme Court affirmed the Ninth Circuit's judgment in *Desert Palace, Inc. v. Costa*, holding that direct evidence of discrimination is not required for a plaintiff to obtain a mixed motive jury instruction under Title VII.[157] The Court agreed with the Ninth Circuit's determination that no heightened evidentiary showing is required under Title VII,[158] and that the starting point for such an analysis begins—and ends—with the statutory text.[159] "In order to obtain an instruction under § 2000e-2(m), a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'"[160] Justice O'Connor even wrote in a separate concurring opinion, emphasizing the Civil Rights Act of 1991 codified a new evidentiary rule for mixed motive cases under Title VII, and agreeing that the District Court did not abuse its discretion in giving a mixed motive instruction to the jury.[161] However, like the Civil Rights Act of 1991, this case is only binding precedent for Title VII employment discrimination cases, and does not change the courts' application of the "direct evidence" requirement for Title VIII cases, thus leaving courts deciding Title VIII mixed motive housing discrimination cases in the morass of "direct evidence" and determining when a mixed motive instruction should be given to the jury.

IV. RESOLVING THE MIXED MOTIVE QUESTION FOR TITLE VIII

Currently, a disparity exists in how to address mixed motive claims under Title VII and Title VIII. Under Title VII mixed motive claims, if the defendant can prove that he would have made the same adverse employment decision absent consideration of discriminatory factors, he will still be held liable for

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156. *See supra* notes 61-62 and accompanying text.

157. 123 S. Ct. 2148, 2155 (2003).

158. 42 U.S.C. § 2000e-2(m).

159. *Desert Palace, Inc.*, 123 S. Ct. at 2153.

160. *Id.* at 2155.

161. *Id.* (O'Connor, J., concurring).

violation of Title VII. However, under Title VIII, if the defendant can prove that she would have made the same adverse housing decision absent consideration of discriminatory factors, she will avoid liability altogether. Considering that Title VII and Title VIII are so closely related and interpreted in a similar manner, this disparity should be resolved in order to properly effectuate the purpose of the Civil Rights Acts of 1964 and 1968.

A. Three Alternatives to Addressing Title VIII Mixed Motive Claims

Three possible alternatives exist for dealing with mixed motive disparate treatment claims under Title VIII in light of *Price Waterhouse* and the 1991 Civil Rights Act. The first alternative is to maintain the status quo and continue to apply the *Price Waterhouse* analysis to Title VIII claims. The second alternative is to interpret the 1991 Civil Rights Act as applying to Title VIII claims as well as Title VII. The third option is to return to pre-*Price Waterhouse* Title VIII jurisprudence and interpret the statute consistent with those opinions.

1. Continue to Apply Price Waterhouse.—One possible alternative to the approach to analyzing mixed motive housing discrimination under Title VIII would be to maintain the status quo and continue to apply the *Price Waterhouse* framework. However, continuing to apply *Price Waterhouse* to Title VIII mixed motive claims is an unacceptable alternative. Under this approach, plaintiffs face a higher evidentiary standard when a landlord's actions are motivated by both legitimate non-discriminatory and illegitimate discriminatory purposes in making a housing decision. Not only does the plaintiff have the burden of showing direct evidence of discrimination in order to trigger a *Price Waterhouse* mixed motive analysis, but her claim may then be defeated if the defendant can meet its burden of persuasion of showing that it would have made the same decision absent the discriminatory consideration.[162] Since the definition of "direct evidence" can range from anything from evidence requiring no inferences that have a direct relation to the housing decision, to circumstantial evidence bearing only a slight relation to the adverse housing decision,[163] it is uncertain exactly what type of evidence would trigger a mixed motive analysis. Considering real-world circumstances and the variety of criteria that go into qualifying a tenant for housing, evictions, sales, services, and loans, defendants have a plethora of legitimate factors to point to that would justify their denial of housing or services to prospective tenants or purchasers. Thus, even if a prospective tenant were able to prove by the higher standard of "direct evidence" that the landlord had a discriminatory motive, her efforts are ultimately in vain when the defendant produces evidence of the legitimate factor that would have justified rejection anyway. If the plaintiff does not produce sufficient evidence to trigger a mixed motive analysis, her claim will probably also fail under the *McDonnell Douglas/Burdine* pretext analysis, since the legitimate reason offered by the defendant most likely would be a valid, non-pretextual reason, and the plaintiff

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162. Cato v. Jilek, 779 F. Supp. 937, 944 (N.D. Ill. 1991).

163. *See supra* notes 69-79 and accompanying text.

would still have the burden of persuasion that the legitimate reason is pretextual. Allowing the *Price Waterhouse* analysis to govern Title VIII mixed motive cases essentially blocks all remedies to plaintiffs harmed in part by discriminatory motives.

2. Apply the 1991 Civil Rights Act to Title VIII.—Another alternative to resolving the problems of mixed motive analyses under Title VIII is to interpret the 1991 Civil Rights Act as applying to Title VIII. Some commentators have suggested that *Price Waterhouse v. Hopkins* is no longer applicable to the Fair Housing Act by virtue of the fact that the Civil Rights Act of 1991 overturned the Court's decision by amendment of Section 703 of Title VII.[164] John P. Relman stated that the section "essentially adopts the approach found in the pre-*Hopkins* Title VIII case law, providing that 'an unlawful employment practice is established when the complaining party demonstrates that [a prohibited factor] was a motivating factor . . . even though other facts also motivated the practice.'"[165] However, while this argument is somewhat plausible, it is easily countered by the argument that the Civil Rights Act of 1991 amended only specific provisions of Title VII, not Title VIII.[166] Courts often have refused to apply statutes by implication, and instead prefer to rely on the express intent of Congress.[167] The congressional record makes no mention of Title VIII, and only addresses desired changes to Title VII. Thus, the Civil Rights Act of 1991 cannot be solely relied upon to effectuate a change in Title VIII mixed motive analyses.

3. Abandon Price Waterhouse *for Title VIII Mixed Motive Claims.*—The third approach to resolving the problems with analyzing Title VIII mixed motive claims is to abandon the *Price Waterhouse* analysis altogether. This is the most logical resolution in light of the close relationship between Title VII and Title VIII and the congressional intent and purpose of the respective Civil Rights Acts. Congress already has resolved part of the injustice created by *Price Waterhouse* by striking a compromise and allowing reduced damages where the defendant proves that he would have made the same adverse employment decision absent the discriminatory motive.[168] In *Costa*, the Ninth Circuit has further suggested a way to remove an additional barrier to plaintiffs' recovery by abandoning the requirement that direct evidence trigger a mixed motive analysis,[169] an approach

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164. JOHN P. RELMAN, HOUSING DISCRIMINATION PRACTICE MANUAL § 2.6(1)(b). This was also the argument by the appellants in *HUD v. Denton II*, 1992 WL 406537, at *7 (H.U.D.A.L.J.). This argument was swiftly rejected by the ALJ. *See also Cato*, 779 F. Supp. at 943 n.19 ("[T]he undiluted *Price Waterhouse* standard continues to control in Title VIII 'mixed motive' cases.").

165. RELMAN, *supra* note 164.

166. *Cato*, 779 F. Supp. at 943 n.19. *See also Denton II*, 1992 WL 406537 at * 8.

167. *Denton II*, 1992 WL 406537 at *7. *Cf.* Alexander v. Sandoval, 532 U.S. 275, 288 (2001) ("We therefore begin (and find that we can end) our search for Congress's intent with the text and structure of Title VI.").

168. 42 U.S.C. § 2000e-5(g)(2)(B) B (2003).

169. Costa v. Desert Palace Inc., 299 F.3d 838, 853 (9th Cir. 2002).

affirmed by the Supreme Court.[170] The Ninth Circuit's approach in *Costa* provides an interesting suggestion for remedying the injustice caused by applying *Price Waterhouse* in Title VIII mixed motive claims.

B. Complete Abandonment of Price Waterhouse *Should Likewise Occur for Title VIII*

The Ninth Circuit in *Costa* presents interesting possibilities for the application of *Price Waterhouse* to Title VIII mixed motive claims. First is the suggestion that the liability component of a mixed motive claim should be altered so that a plaintiff proving that a defendant acted with discriminatory animus will have some type of remedy. Second, the analysis of such claims should no longer follow the framework established by Justice O'Connor in *Price Waterhouse* to determine when a mixed motive analysis is appropriate. The abandonment of the requirement of "direct evidence" in the context of housing discrimination under Title VIII should occur for the same reasons articulated by the Ninth Circuit in *Costa*, as well as based on historical interpretation and application of Title VIII. A heightened evidentiary requirement for mixed motive claims had not been imposed on Title VIII plaintiffs prior to *Price Waterhouse*, and defendants were still found liable for actions that were motivated in part by discrimination. Such a heightened evidentiary standard and method for a defendant to avoid liability where there is proof of discriminatory animus is at odds both with the language and purpose of the statute.

1. Statutory Interpretation Principles of Title VIII.—The Ninth Circuit's focus on the statutory interpretation of Title VII to determine that there was no requirement of "direct evidence" to trigger a mixed motive analysis is not at odds with principles of Title VIII statutory interpretation and statutory interpretation in general. The starting point for statutory interpretation lies in the text of the statute.[171] The relevant statutory provision states "it shall be unlawful . . . [t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[172] There is no indication that "because of" is limited to one motivating factor. However, the language of the statute does not shed much light on the congressional intent in analyzing mixed motive disparate treatment claims under Title VIII.

2. Congressional Intent of Title VIII.—The second method of statutory interpretation used when text is not sufficient is to look to congressional intent

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170. Desert Palace Inc., v. Costa, 123 S. Ct. 2148, 2155 (2003).

171. Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322, 330 (1978) (quoting Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975)) (observing that "[t]he starting point in every case involving construction of a statute is the language itself"). *See also* SCHWEMM, *supra* note 3, § 7:1.

172. 42 U.S.C. § 3604(a) (2003).

underlying the statute.[173] Records of congressional intent for Title VIII are somewhat sparse, consisting primarily of floor debates on the bill.[174] The congressional record does not include the committee reports and other documents that usually accompany major legislation due to the fact that Title VIII resulted from a relatively short and intense period of congressional consideration amidst the background of dramatic national events.[175] Thus, the legislative history is not very helpful in conclusively determining congressional intent for the Fair Housing Act.[176]

3. Trafficante *Principles of Title VIII Interpretation.*—One of the most important sources in determining statutory interpretation techniques for the Fair Housing Act is the first Title VIII Supreme Court decision, *Trafficante v. Metropolitan Life Insurance Co.*[177] The Supreme Court's unanimous opinion in *Trafficante* "is still the most important source of judicial guidance for divining the congressional intent underlying the Fair Housing Act."[178] In *Trafficante*, the Court was determining the issue of whether tenants in an apartment complex had standing to sue their landlord for discriminating against minority applicants.[179] In finding that the tenants did have standing, the court commented that Title VIII reflects "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution."[180] The principle that the Fair Housing Act is to be construed broadly has been repeatedly reaffirmed by the Supreme Court.[181]

The broad interpretation of standing was only one aspect of statutory interpretation articulated by the Supreme Court in *Trafficante*. The Court

established four important tenets of statutory construction concerning the

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173. SCHWEMM, *supra* note 3, at 7-2.

174. *Id.* at 5-6.

175. *Id.* Although Congress had considered a fair housing act for almost two years, Title VIII's actual passage came swiftly after the Kerner Commission Report, which discussed at length the growing problems of racial residential segregation and the resulting social disorder, the assassination of Dr. Martin Luther King, Jr., and a series of urban riots. The time from the issuance of the Kerner Report to President Johnson's signing of the Civil Right Act of 1968 occurred in the short span between March 1, 1968 and April 11, 1968. *Id.*

176. Trafficante v. Metro. Life Ins. Co., 409 U.S. 205, 210 (1972) (recognizing that "[t]he legislative history of the Act is not too helpful").

177. 409 U.S. 205 (1972).

178. SCHWEMM, *supra* note 3, at 7-2.

179. *Trafficante*, 409 U.S. at 207-09.

180. *Id.* at 209 (quoting Hackett v. McGuire Bros., Inc., 445 F.2d 442, 446 (3d Cir. 1971) (internal quotations omitted)). *See also* Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977) (recognizing Congress's strong national commitment to the promotion of integrated housing); Griffin v. Breckenridge, 403 U.S. 88, 97 (1971) (reinforcing that the Supreme Court interprets civil rights statutes broadly).

181. Havens Realty Corp. v. Coleman, 455 U.S. 363, 380 (1982); *see also* City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 731 (1995) (reaffirming *Trafficante's* recognition of Title VIII's "broad and inclusive compass" and therefore entitling the Act to a "generous construction").

> Fair Housing Act: (1) that the statute should be construed broadly; (2) that integration was an important goal of the proponents of Title VIII; (3) . . . Title VII decisions can be relied on to help interpret Title VIII; and (4) that interpretations of Title VIII by the Department of Housing and Urban Development (HUD) are entitled to a good deal of weight in construing the statute.[182]

The most important tenets of construction for the purpose of determining the question of how to analyze mixed motive claims are broad construction of the Fair Housing Act and interpretation in light of Title VII. The Supreme Court in *Trafficante* decided unanimously that the clear intent of Congress was that the Fair Housing Act should be construed broadly.[183] The Court's opinion stated that the language of the Fair Housing Act is "broad and inclusive"[184] and that the Act effectuates a "policy that Congress considered to be of the highest priority."[185] The Court determined that the only way to carry out this important policy of Congress would be to give "generous construction" to the statute.[186] Numerous lower courts have determined that the Fair Housing Act warrants the "broadest possible interpretation."[187]

The second relevant tenet of construction for mixed motive analyses under Title VIII is the importance of judicial interpretation of Title VII. The similarity of the interpretations of the statute is warranted by the fact that they "are part of a coordinated scheme of federal civil rights laws enacted to end discrimination [and] the Supreme Court has held that both statutes must be construed expansively to implement that goal."[188] Thus, principles that are related to the ultimate goal of the two Acts, eliminating discrimination, should be interpreted in a similar fashion.

4. Statutory Construction and Title VIII Mixed Motive Cases.—Based on these tenets of statutory construction for Title VIII, it follows that the application of *Price Waterhouse* to mixed motive claims is inconsistent with the concepts of congressional intent of broad construction and statutory interpretation in light of developments in Title VII law. First, eliminating a path of recourse for plaintiffs harmed by discriminatory motives does not follow from the intent to prevent discrimination in housing. On the contrary, if defendants know that they may avoid liability by ensuring that they can find a legitimate reason to deny a prospective tenant housing, they can just as easily build this into their selection

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182. *See* SCHWEMM, *supra* note 3, at 7-3.

183. *Id.*

184. *Trafficante*, 409 U.S. at 209.

185. *Id.* at 211.

186. *Id.* at 212.

187. SCHWEMM, *supra* note 3, at 7-4. *See, e.g.*, Huntington Branch of the NAACP v. Town of Huntington, 844 F.2d 926, 935 (2d Cir.), *aff'd per curiam*, 488 U.S. 15 (1988); United States v. Gilbert, 813 F.2d 1523, 1526-27 (9th Cir. 1987); Guider v. Bauer, 865 F. Supp. 492, 495 (N.D. Ill. 1994).

188. *Huntington*, 844 F.2d at 935.

policy as they can build discriminatory factors into their policies.[189] Denying a remedy to plaintiffs who have been harmed by discrimination does not effectuate the intent that the Fair Housing Act should be broad and expansive in its scope in seeking to prevent discrimination in housing.

Secondly, requiring a heightened evidentiary standard as articulated by Justice O'Connor in *Price Waterhouse*[190] also goes against congressional intent that Title VIII be afforded a broad interpretation. Even if the remedy portion of a mixed motive case was altered to be more in line with Title VII as amended by the Civil Rights Act of 1991, the requirement of direct evidence in order to trigger a mixed motive analysis would still pose a great hindrance to Title VIII mixed motive plaintiffs.

In discussing the propriety of allowing a finding of disparate impact to be a violation of section 3604(a) of the Fair Housing Act, the Seventh Circuit Court of Appeals amply stated in *Metropolitan Housing Development Corp., v. Village of Arlington Heights*,[191] (*Arlington Heights II*),

> "[i]ntent, motive, and purpose are elusive subject concepts" and attempts to discern the intent of an entity such as a municipality are at best problematic .... A strict focus on intent permits racial discrimination to go unpunished in the *absence of evidence of overt bigotry*. As overtly bigoted behavior has become more unfashionable, evidence of intent has become harder to find. But this does not mean that racial discrimination has disappeared. We cannot agree that Congress in enacting the Fair Housing Act intended to permit municipalities to systematically deprive minorities of housing opportunities simply because those municipalities act discreetly.[192]

Thus, in recognizing that lack of proof of intent does not mean lack of discrimination, the Seventh Circuit noted that proof of discriminatory intent is often hard to come by. Reasons for acknowledging the need to allow a showing of disparate impact to show a violation of the Fair Housing Act also warrant a finding that a showing that a defendant relied on a permissible and impermissible reason in a housing decision would be a violation. Even though disparate treatment and disparate impact require two different methods of analysis, the comparison is still apt in showing that proof of discriminatory intent is often hard to come by. Thus, it follows that direct evidence of discriminatory intent for purposes of mixed motive claims is even more difficult to attain.

Although the Seventh Circuit was addressing the difficulty of discerning intent from municipalities' actions, the same falls true for many private landlords

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189. Indeed, the Second Circuit noted in *Huntington*, 844 F.2d at 935, that "clever men may easily conceal their motivations." (quoting Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032, 1043 (2d Cir. 1979) (internal quotations omitted)).

190. 490 U.S. 228 (1989).

191. 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978).

192. *Id.* at 1290 (citing Hawkins v. Town of Shaw, 461 F.2d 1171, 1172 (5th Cir. 1972) (en banc) (per curiam) (emphasis added) (citations omitted)).

and other entities in the housing services market who have several employees or operate through management companies. Like a municipality, there may be many individuals involved in the policy and decision making process. It may be difficult, if not impossible, for a plaintiff to pinpoint at what stage in the decision making process that the "direct evidence" of discrimination can be found. Indeed, as the Seventh Circuit pointed out, discreet acts of discrimination may be just as egregious as blatant acts of discrimination, and both deserve remedy under the Fair Housing Act. In addition, private individuals who act to perpetuate housing segregation deserve just as much, if not more, scrutiny than the actions of a governmental body.[193]

Third, allowing Title VIII mixed motive cases to be analyzed using the framework established in *Price Waterhouse* ignores the mandate that Title VIII be interpreted in light of Title VII.[194] For the past thirteen years, Title VII has been interpreted as not allowing employers to escape liability in cases of mixed motive discrimination. Although the 1991 Civil Rights Act does not directly foreclose courts from applying *Price Waterhouse* to Title VIII claims,[195] courts should take note of the congressional desire to remedy the ill effects that *Price Waterhouse* had on Title VII claims. There has been wide acceptance of Title VII principles in Title VIII law, most notably the *McDonnell Douglas/Burdine* framework.[196] The fact that the change in Title VII law was congressionally mandated should be of no consequence. On the contrary, that Congress expressly altered Title VII law should lend more support to the proposition that a similar change should be made for Title VIII since the congressional intent for the two civil rights laws is very similar.

C. Suggestions for a More Workable Approach to Title VIII Mixed Motive Claims

Mixed motive claims under Title VIII should no longer utilize any aspects of *Price Waterhouse*, and instead should look to pre-*Price Waterhouse* mixed motive housing discrimination claims, particularly the lower courts' decisions for Title VIII cases. The Ninth Circuit's analysis and reasoning in *Costa* should provide a workable framework for analyzing Title VIII mixed motive claims.

*1. Return to the Pre-*Price Waterhouse *Cases to Decide Title VIII Mixed Motive Cases.*—Lower courts deciding cases involving multiple motive housing discrimination under Title VIII prior to *Price Waterhouse* have determined that

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193. *Id.* at 1293. ("If the defendant is a private individual or a group of private individuals seeking to protect private rights, the courts cannot be overly solicitous when the effect is to perpetuate segregated housing.").

194. *See supra* note 188 and accompanying text.

195. *See supra* notes 166-67 and accompanying text.

196. Pinchback v. Armistead Homes Corp., 689 F. Supp. 541, 553 (D. Md. 1988). The District Court in this case also accepted the "futile gesture" theory under Title VII and applied it to a housing discrimination case.

there was no room for partial discrimination under the Fair Housing Act.[197] The Supreme Court has never decided a mixed motive housing discrimination claim under Title VIII, so presumably the issue has not fully been settled.

Although the Supreme Court ruled in *Arlington Heights I* that there would be no finding of liability under the Equal Protection Clause if the defendant could prove a legitimate, non-discriminatory reason for making the adverse housing decision,[198] the same does not necessarily follow for mixed motive claims under Title VIII. First, Title VIII was meant to be a broad remedial statute, more expansive than the Equal Protection Clause. The Equal Protection Clause has been interpreted very narrowly, only allowing a showing of intentional discrimination to find liability. Conversely, there is abundant authority expressly allowing a broad interpretation and generous construction of Title VIII.[199] Thus, protections not necessarily afforded by the Equal Protection Clause should not constrain the protections afforded by the Fair Housing Act.

Secondly, as the Equal Protection Clause only applies to governmental actors, there are fewer justifications for allowing a private actor to escape liability upon a showing of a legitimate motivating factor than exist in allowing a municipality to escape liability upon the showing of a compelling governmental interest. Municipalities must balance many considerations in zoning and housing decisions, and courts traditionally afford great deference to legislative and administrative decisions for that reason.[200] However, as Title VIII applies to individuals as well as municipalities, there are fewer considerations that must be taken into account, and courts do not give the same deference to individual decisions that they do to governmental decisions.[201]

History, as well as practical considerations, supports the propriety of returning to pre-*Price Waterhouse* housing discrimination decisions and deciding mixed motive cases more in line with cases such as *Adler.* By not allowing discriminatory animus to play a role in any housing decision and holding a defendant liable for such is the best way to effectuate one of the primary purposes of the Fair Housing Act, which is to prevent discrimination in housing.

2. Costa *Approach to Analyzing Title VIII Mixed Motive Claims.*—A workable suggestion for analyzing Title VIII mixed motive claims may be found by looking to the Ninth Circuit's approach in *Costa v. Desert Palace, Inc.* A framework similar to that established by the Ninth Circuit's decision would provide the best means of effectuating the mandates of Title VIII in a logical and consistent manner.

First, the framework under *McDonnell Douglas* should be retained as one method of establishing the prima facie case in a Title VIII claim. The *McDonnell Douglas* framework is necessary so plaintiffs may be able to state their claim and

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197. Smith v. Sol D. Adler Realty Co., 436 F.2d 344, 349-50 (7th Cir. 1970). *See also* SCHWEMM, *supra* note 3, at 10-23.

198. Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 271 n.21 (1977).

199. *See supra* notes 182-87 and accompanying text.

200. *Arlington Heights*, 429 U.S. at 256-66.

201. *See supra* note 192 and accompanying text.

survive the summary judgment phase of litigation. This allows a plaintiff to garner additional evidence during the discovery phase of litigation so that she may bolster her case against the defendant. The plaintiff should then produce evidence sufficient to warrant the inference that the discriminatory purpose was a motivating factor in the challenged housing decision.

Second, after the parties have introduced their evidence at trial, the trial judge should determine whether the case is one warranting a single motive or mixed motive jury instruction. If, based on all of the evidence, the trial judge determines that the only reasonable conclusion a jury could reach is that the defendant was motivated solely by discriminatory purpose in the challenged housing decision or that discrimination was not a factor at all, the jury should be given a single motive instruction under the *McDonnell Douglas/Burdine* framework. If the jury determines that the defendant acted because of discriminatory intent, and this was the sole reason for the challenged housing decision, the plaintiff would prevail. If the jury finds that the defendant did not act because of discriminatory intent, the employer will avoid liability under the Fair Housing Act.

Conversely, if the trial judge determines that the evidence presented by the plaintiff, whether direct or circumstantial, could support a finding that the defendant was motivated in its housing decision by multiple factors, both discriminatory and non-discriminatory, the trial judge should give a mixed motive instruction to the jury. The jury would then determine whether the discriminatory purpose was a motivating factor in the challenged housing decision. If the jury finds that discriminatory purpose was a motivating factor, though not necessarily the sole factor, the defendant would be liable under Title VIII. If the jury finds that the discrimination was not a motivating factor, there would be no Title VIII violation.

The propriety of giving a mixed motive instruction should not depend on whether the plaintiff has the ability to produce "direct evidence" of discriminatory purpose, but rather on whether the evidence shows that defendant was possibly motivated by legitimate as well as illegitimate considerations. Abandoning the requirement that the plaintiff present direct evidence of discriminatory purpose eliminates the problem of determining what constitutes "direct evidence," and more importantly, the artificial distinction between single and mixed motive cases.[202]

The one question that remains open under this inquiry is what remedies would be available to a plaintiff if the defendant proves that it would have made the same decision absent the discriminatory factor. Based on prior Title VIII mixed motive cases, the defendant would still be held liable for all possible remedies under the Fair Housing Act.[203] Remedies available under the Fair Housing Act include actual and punitive damages, permanent or temporary injunctions, temporary restraining orders, or other orders, including an order

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202. *See supra* notes 61-62 and accompanying text.

203. *See* Moore v. Townsend, 525 F.2d 482 (7th Cir. 1975) (applying Fair Housing Act legal standard to Title VIII).

enjoining the defendant from engaging in such practice or ordering such affirmative action as may be deemed appropriate by the court.[204] The prevailing plaintiff may also be entitled to reasonable attorney's fees and costs.[205] However, in light of the fact that Title VII and Title VIII are interpreted consistently, there is an argument that the plaintiff's remedies should be limited under Title VIII as they are under Title VII, where a defendant shows that he would have made the same decision absent a discriminatory purpose. Since the 1991 Civil Rights Act does not specifically apply to Title VIII, this is an issue that would need to be addressed by Congress.

CONCLUSION

As demonstrated by the Title VII and Title VIII jurisprudence after *Price Waterhouse*, there is much room for improvement in the framework of analysis used to evaluate mixed motive discrimination claims. The application of *Price Waterhouse* to Title VIII claims has caused a rift between how mixed motive housing discrimination claims have been analyzed prior to and after this important Supreme Court decision. In addition to altering liability for partial discrimination, the decision has also added the elusive concept of "direct evidence" to the analysis of mixed motive claims. *Price Waterhouse* has served to both create injustice as well as confusion and inconsistent application of fair housing law.

In light of changes in Title VII law, as well as the history and intent of the Fair Housing Act, this Note concludes that the injustice caused to Title VIII by *Price Waterhouse* should be remedied by altering the liability component of the mixed motive analysis to be more in line with what Congress intended in enacting the Civil Rights Act of 1991. Additionally, Justice O'Connor's legacy of "direct evidence" should no longer be allowed to determine the threshold for applying a mixed versus a single motive analysis. Rather, the determination should be made based upon the sufficiency of the plaintiff's evidence, not the type. This Note's proposal for a more workable approach to Title VIII mixed motive claims follows the Ninth Circuit's analysis in *Costa* and adopts the rationale that all impermissible housing discrimination should be eliminated in a consistent and rational manner.

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204. 42 U.S.C. § 3613(c)(1) (1995).

205. *Id.* § 3613(c)(2).

CYBERMEDICINE: DEFYING AND REDEFINING PATIENT STANDARDS OF CARE

JULIE REED*

INTRODUCTION

In November 2001, MyDoc.com[1] went online treating Indiana patients over the Internet.[2] On October 16, 2002, the Illinois Department of Professional Regulation issued a Cease and Desist Order prohibiting MyDoc.com ("MyDoc") from treating Illinois patients.[3] The decision was monumental. MyDoc, an Indiana-based company which called itself "the nation's first round-the-clock Internet-based health service offering doctor diagnosis, treatment, prescriptions and follow-up care," intended to expand nationwide within two years.[4] Instead, it was shut down in only its first expansion state after just six months.[5] The decision seemed to answer the question that everyone has been asking: What is the standard of care in the cybermedicine context? In Illinois, the answer is clear. Physicians may not treat patients by prescribing medication absent a physical examination or a physician-patient relationship.[6]

The practice of medicine is regulated by the individual states. The Illinois MyDoc.com decision is not yet the uniformly accepted view across the country, as evidenced by MyDoc's continued operation in Indiana.[7] The regulation of cybermedicine is currently a line-drawing exercise. As the Internet continues to grow in popularity and accessibility, authorities will be forced to determine what kinds of information and interaction they are going to allow on it. Further, with the advent of online medicine, regulators are now forced to decide just how far to let the practice of medicine go. Illinois appears to have drawn their line.

This Note analyzes whether, in a cybermedicine context, the diagnosis and treatment of patients without a prior patient relationship constitute a violation of conventional medical practice standards of care. This Note further analyzes what

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1. Mydoc.com, *at* http://www.homedoc.com (last visited Feb. 7, 2004). The company was later sold and changed its name to HomeDoc. However, for consistency, the company will still be called Mydoc for purposes of this Note.

2. Jeff Swiatek, *Illinois Sidelines MyDoc.com Service*, INDIANAPOLIS STAR, Oct. 31, 2002, at C01 [hereinafter Swiatek, *Illinois*].

3. Illinois Dep't of Prof'l Regulation v. Mydoc.com, No. 200202945-1 (Oct. 16, 2002).

4. Jeff Swiatek, *Revolutionary Medical Web Site Dispenses Advice Day or Night*, INDIANAPOLIS STAR, Dec. 22, 2001, *available at* 2001 WL 32034743 [hereinafter Swiatek, *Revolutionary*].

5. Swiatek, *Illinois*, *supra* note 2.

6. *Mydoc.com*, No. 200202945-1.

7. Swiatek, *Illinois*, *supra* note 2.

those standards should be, assuming conventional practice standards of care are indeed violated. Part I of this Note provides the trends and current usage of the Internet, both generally and in the context of healthcare. Additionally, it will define both telemedicine and cybermedicine and distinguish the two disciplines. Part II describes the online medicine company MyDoc.com, as well as the Cease and Desist Order issued against it by Illinois. Part III defines the conventional physician-patient relationship. It also reviews the various sources of medical standards of care, including law, policy, and ethics. Part IV analyzes the major issues and implications of cybermedicine, including patient exams and histories, questionnaires, medical records, response time, verifying physician credentials, follow-up care, drug prescriptions, patient self-diagnosis, patient accountability, and physician liability. The Note concludes that revisions are needed to the Federal of State Medical Boards (FSMB) guidelines in the context of the issues described in Part IV. It also suggests that in light of the recent inconsistent MyDoc.com decisions, all states need to adopt uniform online medicine guidelines and that the FSMB model is the most appropriate.

I. HEALTHCARE AND THE INTERNET

A. Trends in Healthcare

The face of healthcare has changed dramatically in recent years, for better and for worse. According to one study, more than one quarter of Americans rate the American healthcare system as poor, up from 15% in 1998.[8] Part of the impetus behind patient dissatisfaction is the decline in health insurance coverage. In 2001, the number of our nation's uninsured rose to 41.2 million people, or 14.6%.[9] This number will likely continue to grow with changes in employment coverage.[10] Without insurance, most Americans cannot afford to pay for healthcare.[11]

Additionally, there is an "ongoing backlash" against the cost-competitive and overburdened managed care.[12] The number of consumers who think managed care companies are doing a good job has decreased annually from 51% in 1997

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8. EBRI, 2003 Health Confidence Survey, Summary of Findings 1 (Sept. 2003), *available at* http://www.ebri.org/hcs/2003/03hcssof.pdf.

9. Mike Bergman, U.S. Dept. of Commerce News, *Health Insurance in America: Numbers of Americans with and Without Health Insurance Rise, Census Bureau Reports*, Sept. 30, 2002, *available at* http://www.census.gov/Press-Release/www/2002/cb02-127.html.

10. *Facing the Future*, 22 J. HEALTH CARE MARKET 2427 (Oct. 1, 2002) (predicting that a significant portion of local employers will likely shift to a defined contribution strategy in the next two to five years, leaving thousands of workers with no health insurance), *available at* 2002 WL 18253370.

11. John O'Malley, *Smart Thinking for Challenged Health Systems*, 22 J. HEALTH CARE MARKET 2428 (July 1, 2002) (stating 80% of Americans can't afford to pay for healthcare out of pocket), *available at* 2002 WL 18253347.

12. *Facing the Future*, *supra* note 10.

to 33% in 2002.[13] This growing dissatisfaction has increased with the prevalence of managed care. House calls are non-existent,[14] the frequency[15] and length[16] of office visits have decreased, the length of waiting times in offices has increased,[17] physicians are penalized for sending too many patients to a specialist,[18] and patients are given cheaper medication.[19] These problems are expected to worsen.[20] Patients do not want to wait months for an appointment and like the option of "bypassing secretaries, busy signals, nurses, and switchboards."[21] At the same time that our healthcare system has transformed, so too has consumer reliance on the Internet, facilitating another change in the face of healthcare.

B. Internet Usage and Trends

1. Consumer and Physician Usage.—The advent of the Internet has revolutionized modern society.[22] Numerous studies have calculated the tremendous increase in Internet usage. One study estimated that in 2002, there were over 665 million Internet users worldwide, 160 million of which were in the United States.[23] Another study concluded that the number of American adults online increased from an estimated 17.5 million people, or 9%, in 1995 to an

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13. Humphrey Taylor, *Public Perceptions of Health Insurers, Airlines, Oil Companies and Hospitals Improve While Respect for Computer Hardware and Software Companies Falls Sharply*, THE HARRIS POLL No. 28 (June 19, 2002), *available at* http://www.harrisinteractive.com/harris_poll/index.asp?PID=306.

14. Kelly K. Gelein, Note, *Are Online Consultations a Prescription for Trouble? The Uncharted Waters of Cybermedicine*, 66 BROOK. L. REV. 209, 234 (2000).

15. Arnold J. Rosoff, *Informed Consent in the Electronic Age*, 25 AM. J.L. & MED. 367, 370 (1999).

16. SUSANNAH FOX & LEE RAINIE, PEW INTERNET & AMERICAN LIFE PROJECT: ONLINE LIFE REPORT, THE ONLINE HEALTH CARE REVOLUTION: HOW THE WEB HELPS AMERICANS TAKE BETTER CARE OF THEMSELVES 8 (Nov. 26, 2000) [hereinafter FOX & RAINIE, REVOLUTION] (finding that a typical doctor's visit is less than fifteen minutes and many patients leave a physician's office without getting answers to all the questions they have).

17. Dennis Hamilton, *Online Health Services Step up Their Offerings*, 22 IND. BUS. J., Jan. 28, 2002, at 23 ("The average doctor's visit today is four hours. . . . You have to make the appointment, go to the office, sit in the waiting room with a 3-year-old National Geographic, and finally you get to see the doctor.").

18. Gelein, *supra* note 14, at 234.

19. Kristen Green, *Marketing Health Care Products on the Internet: A Proposal for Updated Federal Regulations*, 24 AM. J.L. & MED. 365, 386 (1998).

20. *Facing the Future*, *supra* note 10 (predicting that a shortage of physicians could occur in the next two to five years, increasing patient wait times and travel distances).

21. Gelein, *supra* note 14, at 240 (citation omitted).

22. For an excellent discussion of the history of the Internet, see *id.*

23. Press Release, Computer Industry Almanac, Inc., USA Tops 160M Internet Users (Dec. 16, 2002), *available at* http://www.c-i-a.com/pr1202.htm. The number of Internet users is expected to top one billion in 2005. *Id.*

estimated 137 million people, or 66%, in 2002.[24] One result of this increased Internet usage is the rapid growth of the healthcare industry on the Internet.

2. Internet Application to the Healthcare Industry.—The Internet has become a resource for both health-related information and treatment. There are an estimated 100,000 medical and health-related web sites on the Internet.[25] Studies suggest that somewhere between 77 million (66%)[26] and 109 million (78%)[27] of adult American Internet users have gone online in search of health or medical information. These cyberchondriacs are using sites of established organizations—academic, governmental, pharmaceutical, etc.—rather than using "pure e-health" sites.[28] For example, the number of National Library of Medicine Medline database searches increased from 7 million in 1996 to 120 million in 1997 when free public access was opened; the new searches are attributed primarily to non-physicians.[29]

A number of explanations exist for the increase in medical information readily available on the Web. Some factors which contribute to demands for information, "pull factors," include demographic shifts, increased education levels, increased comfort with new technologies, new consumer activism/involvement, changing profile of the healthcare system, and changing technology.[30] Entities creating demand for such information, "push factors," include governmental agencies, medical healthcare providers, marketers of

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24. Humphrey Taylor, *Internet Penetration at 66% of Adults (137 Million) Nationwide*, THE HARRIS POLL No. 18 (Apr. 17, 2002) [hereinafter Taylor, *Internet Penetration*], *available at* http://www.harrisinteractive.com/harris_poll/index.asp?PID=295.

25. Gunther Eysenbach, *Shopping Around the Internet Today and Tomorrow: Towards the Millennium of Cybermedicine*, 319 BRIT. MED. J. 1294 (1999) [hereinafter Eysenbach, *Shopping*].

26. SUSANNAH FOX & DEBORAH FALLOWS, PEW INTERNET & AMERICAN LIFE PROJECT, INTERNET HEALTH RESOURCES: HEALTH SEARCHES AND EMAIL HAVE BECOME MORE COMMONPLACE, BUT THERE IS ROOM FOR IMPROVEMENT IN SEARCHES AND OVERALL INTERNET ACCESS 1 (July 16, 2003) [hereinafter FOX & FALLOWS, INTERNET HEALTH RESOURCES], *available at* http://www.pewinternet.org/reports/pdfs/PIP_Health_Report_July_2003.pdf.

27. *No Significant Change in the Numbers of "Cyberchondriacs"—Those Who Go Online for Health Care Information, Says Latest National Survey*, HARRIS INTERACTIVE (March 29, 2003), *available at* http://www.harrisinteractive.com/news/allnewsbydate.asp?NewsID=600. *But see* Ha T. Tu & J. Lee Hargraves, *Seeking Health Care Information: Most Consumers Still on the Sidelines*, CENTER FOR STUDYING HEALTH SYSTEM CHANGE (March 2003) (suggesting the number is really only 30 million, or 16%).

28. Humphrey Taylor, *Cyberchondriacs Update*, THE HARRIS POLL No. 21 (May 1, 2002), *available at* http://www.harrisinteractive.com/harris_poll/index.asp?PID=299.

29. Gunther Eysenbach, *Towards the Millennium of Cybermedicine*, 1 J. MED. INTERNET RES. e2 (1999) [hereinafter Eysenbach, *Millennium*] (citation omitted); *see also* Eysenbach, *Shopping*, *supra* note 25 (suggesting that patient access to databases increases consumer knowledge, pushing clinicians to higher quality standards and evidence based medicine).

30. Pamela C. Sieving, *Factors Driving the Increase in Medical Information on the Web—One American Perspective*, 1 J. MED. INTERNET RES. e3 (1999).

medical care or products, libraries, and organizations and support groups.[31] Once consumers retrieve health information from the Internet, they use it to actively participate in their treatment and diagnosis.

Patients also go online to seek actual treatment advice and prescriptions from a physician. In what has become a "quiet revolution," patients now use the Internet's "point-and-click convenience" to obtain advice and seek medication, without ever seeing a doctor or visiting a pharmacy.[32] According to one study, about 6 million Americans go online for medical advice on a typical day, which is more than the number who actually visit health professionals.[33] These numbers will increase as consumers push for more online interaction with their doctors. For example, while only 3.7 million U.S. adults have e-mailed a doctor's office, 33.6 million more are interested in doing so.[34] Not only do consumers ask for advice, but they also assume an active role in managing their own healthcare. For instance, 25% of adults who visit disease sites have requested specific brand-name prescriptions from their doctors.[35]

While physicians have been slower to use the Web, they are no longer "cybervirgins."[36] Although only 30% of physicians using the Internet have a website, the amount of physicians who use the Internet increased from 54% in 1997 to 78% in 2002.[37] Further, the amount of time physicians spend online has increased.[38] As physicians grow more comfortable with using the Internet, they are beginning to use it more for patient care. Currently, 49% of medical professionals occasionally engage in e-mail correspondence with their patients.[39] However, many physicians are still cautious of e-health information. While most physicians say that discussing the results of patients' Internet searches is helpful, the majority of those do not say it is because of the risk of patient self-treatment.[40]

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31. *Id.*

32. Katy Ellen Deady, Note, *Cyberadvice: The Ethical Implications of Giving Professional Advice over the Internet*, 14 GEO. J. LEGAL ETHICS 891, 892 (2001) (citation omitted).

33. SUSANNAH FOX & LEE RAINIE, PEW INTERNET & AMERICAN LIFE PROJECT, VITAL DECISIONS: HOW INTERNET USERS DECIDE WHAT INFORMATION TO TRUST WHEN THEY OR THEIR LOVED ONES ARE SICK 27 (May 22, 2002) [hereinafter FOX & RAINIE, VITAL DECISIONS], *available at* http://www.pewinternet.org/reports/pdfs/PIP_Vital_Decisions_May2002.pdf.

34. Information Technology Association of America, *e-Health: Cyber Dialogue Releases Cybercitizen Health 2000* (Sept. 2000), *available at* http://www.itaa.org/isec.htm.

35. *Id.*

36. Robert Lowes, *Don't Let This Revolution Leave You Behind*, MED. ECON., Apr. 26, 1999.

37. AMA, News Release, *Study: Physicians' Use of Internet Steadily Rising* (July 17, 2002), *available at* http://www.ama-assn.org/ama/puib/print/article/1616-6473.html.

38. *Id.*

39. Health on the Net Foundation, *Excerpt of the 8th HON's Survey of Health and Medical Internet Users*, *available at* http://www.hon.ch/Survey/8th_HON_results.html (2002).

40. *Id.* Patient self-treatment will be further discussed infra Part IV.H.

C. New Forms of Healthcare

1. e-Health Generally.—Technology is outpacing the law[41] and medicine. The product resulting from the synergy of technology and medicine is e-health. E-health covers two distinct areas: health information and delivery of patient care.[42] The latter, online medical services, are considered the "next transformation" in healthcare.[43] There are more than 3000 medical advice sites on the Internet.[44] The largest limitation to this new method of patient care is not the technology itself, but physician restrictions. The practice of medicine is regulated by the individual state in which the patient resides.[45] Physicians who practice medicine across state lines[46] without physically being located in the state where the patient encounter occurs are required to either have a full and unrestricted license in that state or are unregulated. Patient care that takes place across state lines is defined as one of two types: telemedicine or cybermedicine.

2. Telemedicine.—Telemedicine can be defined in various ways. Generally, it is "the use of electronic communication and information technologies to provide or support clinical care at a distance."[47] It is performed "by allowing a consulting physician at one location to observe a patient or data concerning the

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41. Judith F. Darr & Spencer Koerner, M.D., *Telemedicine: Legal And Practical Implications*, 19 WHITTIER L. REV. 3, 15 (1997).

42. SPECIAL COMM. ON PROF'L CONDUCT AND ETHICS, FED'N OF STATE MED. BOARDS, MODEL GUIDELINES FOR THE APPROPRIATE USE OF THE INTERNET IN MED. PRAC. (Apr. 2002) [hereinafter FSMB, MODEL GUIDELINES] ("The Committee focused the guidelines on the latter due to its direct impact on patient safety and welfare and the physician-patient relationship."), *available at* http://www.fsmb.org.

43. Gelein, *supra* note 14, at 227 (citation omitted).

44. Hamilton, *supra* note 17.

45. AMA, Board of Trustees Report 6-A-02, *Guidance for Physicians on Internet Prescribing* (2002) [hereinafter AMA, Report], *available at* http://www.ama-assn.org/ama1/upload/mm/annual02/bot6a02.doc.

46. *See* SPECIAL COMM. ON PROF'L CONDUCT AND ETHICS, FED'N OF STATE MED. BOARDS, REPORT ON PROFESSIONAL CONDUCT AND ETHICS § 4 (Apr. 2000) [hereinafter FSMB, CONDUCT AND ETHICS] (defining the practice of medicine as offering or undertaking to prescribe, order, give or administer any drug or medicine for the use of any other person), *available at* http://www.fsmb.org; *see also* REPORT OF THE AD HOC COMM. ON TELEMEDICINE, FED'N OF STATE MED. BOARDS, TELEMEDICINE, A MODEL ACT TO REGULATE THE PRAC. OF MED. ACROSS STATE LINES: AN INTRODUCTION AND RATIONALE (Apr. 1996) [hereinafter FSMB, MODEL ACT] (defining the practice of medicine across state lines to include any medical act that occurs when the patient is physically located within the state and the physician is located outside the state), *available at* http://www.fsmb.org/Policy%20Documents%20and%20White%20Papers/telemed.htm.

47. *Telemedicine Report to Congress Executive Summary*, 73 N.D. L. REV. 131, 131-32 (1997).

patient at another location."[48] Telemedicine is not a recent development.[49] While telemedicine has been evolving in the United States and abroad for the past thirty-five years, interest in the field has increased dramatically since 1990 because of the demand for accessible and cost-effective healthcare.[50] The telemedicine industry is predicted to grow 40% annually over the next ten years to represent at least 15% of all healthcare expenditures by 2010.[51]

3. Cybermedicine.—Commentators have struggled with how to define and characterize cybermedicine. While some use telemedicine as the broader term and consider e-medicine, or cybermedicine, a subset of telemedicine,[52] others view cybermedicine as the broader concept because it encompasses areas beyond telemedical treatments.[53] In light of the breadth of available services, the latter definition is preferred. Cybermedicine is "the internet driven practice of medicine where patients communicate with physicians . . . through electronic mail"[54] and online bulletin boards.[55] It includes nearly every facet of the practice of medicine, such as "marketing, relationship creation, advice and prescribing and selling drugs and devices."[56] Its potential is unpredictable and unbounded and its "levels of interactivity [are] as yet unknown."[57] However, cybermedicine is void of one level of interactivity: direct patient interaction. The cyberpatient never actually meets the physician, and information is only provided through the typed word.[58]

Cybermedicine provides many advantages over conventional medicine. The Internet can enhance medical care by providing a vehicle to facilitate communication between healthcare providers, refill prescriptions, obtain laboratory results, reschedule appointments, monitor chronic conditions,[59]

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48. Daniel McCarthy, *The Virtual Health Economy: Telemedicine and the Supply of Primary Care Physicians in Rural America*, 21 AM. J.L. & MED. 111, 113 (1995).

49. *See generally*, KRISTINE SCANNELL ET AL., TELEMEDICINE, PAST, PRESENT, FUTURE: JANUARY 1966-MARCH 1995 (1995).

50. FSMB, MODEL ACT, *supra* note 46.

51. *Telemedicine Will Grow 40 Percent Annually over the Next 10 Years, Says Industry Expert*, BUS. WIRE (NY), Dec. 2, 1999.

52. *See* Deady, *supra* note 32, at 893.

53. Jessica W. Berg, *Ethics and E-Medicine*, 46 ST. LOUIS U. L.J. 61, 61 n.1 (2002); *see also* Kim Solez & Sheila Moriber Katz, *Cybermedicine: Mainstream Medicine By 2020/Crossing Boundaries*, 19 J. MARSHALL J. COMPUTER & INFO. L. 557, 557 (2001) ("Cybermedicine is not a sub-set of something else: it is the embodiment of 21st Century medicine.").

54. Ranney V. Wiesemann, *On-Line or On-Call? Legal and Ethical Challenges Emerging in Cybermedicine*, 43 ST. LOUIS U. L.J. 1119, 1119 (1999).

55. Deady, *supra* note 32, at 893.

56. *Id.*

57. Nicholas P. Terry, *Cyber-Malpractice: Legal Exposure for Cybermedicine*, 25 AM. J.L. & MED. 327, 328 (1999) (citation omitted).

58. Deady, *supra* note 32, at 893.

59. Gelein, *supra* note 14, at 230-31 (discussing diabetes and cardiac patients).

maintain anonymity,[60] provide healthcare information and clarify medical advice.[61] The most frequently reported problem by consumers is inconvenient access to care.[62] The healthcare delivery system finally found a solution: bring the service to the consumer.[63] Internet medical consulting services are expected to reduce the number of in-patient visits and force overall improvements in medical care.[64] However, because cybermedicine lacks direct physician-patient interaction, it is difficult to monitor abuse,[65] there is less prevalence of an ongoing physician-patient relationship,[66] patients may lack the skills to use the technology,[67] and there is an increased possibility of adverse outcomes.[68]

4. Distinguishing Cybermedicine and Telemedicine.—The best way to understand both cybermedicine and telemedicine is by distinction. Unlike telemedicine, cybermedicine eliminates the middleman, the licensed, in-state provider, and it is generally paid for out of pocket.[69] Cybermedicine deals with global exchange of open, non-clinical information, mostly from patient to patient, sometimes between patient and physician or from physician to physician. Telemedicine, on the other hand, mainly deals with the restricted exchange of clinical data in a closed setting, for the most part from patient to physician and from physician to physician.[70] Telemedicine for the most part is applied to diagnostic and curative medicine, while cybermedicine is applied to preventative

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60. Joshua Rosenbaum, *Health: The Typing Cure, Online Therapy Isn't for Everybody; But Proponents Say It Can Fill a Crucial Gap*, WALL ST. J., Sept. 16, 2002, at R10 (discussing the stigma associated with mental health and reluctance to seek treatment due to embarrassment).

61. FSMB, MODEL GUIDELINES, *supra* note 42.

62. Robert J. Blendon et al., *Inequities in Health Care: A Five-Country Survey*, 21 HEALTH AFFAIRS 182, 187 (2002) (reporting 41% of adult U.S. citizens say it is very or somewhat difficult to get care on nights or weekends).

63. Adam Katz-Stone, *E-medicine: Bedside Manner Can Be Miles Away*, WASH. BUS. J. (Dec. 21, 1998), *available at* http://www.bizjournals.com/.

64. Gelein, *supra* note 14, at 239 (citation omitted). *But cf.* Kathryn E. Kerwin & James Madison, *The Role of the Internet in Improving Healthcare Quality*, 47 J. HEALTHCARE MGMT. 225, 236 (July 1, 2002) (suggesting physicians may become barraged with questions by patients with online information); News Release, Saint Louis Univ., *Cybermedicine Expert Explores Health Care on Web: Cybermalpractice Is One Reality Facing Explosive New Industry* (Nov. 8, 1999) (predicting some services will eventually be offered exclusively on the Web making access to healthcare much more difficult for some), *available at* http://www.slu.edu/publications/nb/new/110899.shtml.

65. Deady, *supra* note 32, at 902-03.

66. Gelein, *supra* note 14, at 240 (stating two out of every three adults are less likely to establish an ongoing relationship with their primary care physician than in the past).

67. Rosenbaum, *supra* note 60.

68. FSMB, MODEL ACT, *supra* note 46.

69. Ross D. Silverman, *The Changing Face of Law and Medicine in the New Millennium: Regulating Medical Practice in the Cyber Age: Issues and Challenges for State Medical Boards*, 26 AM. J.L. & MED. 255, 265-66 (2000).

70. Eysenbach, *Shopping*, *supra* note 25.

medicine and public health.[71]

One commentator has suggested there are three discrete categories of e-medicine,[72] which translate into discrete categories of liability:[73] (1) patient education, which has very little liability;[74] (2) specialist consultations and advice,[75] which has moderate liability;[76] and (3) the actual practice of medicine, diagnosis, and treatment of patients on the Internet,[77] with the potential for serious liability.[78] MyDoc.com is a recent example of this last category.

II. MYDOC.COM

A. About MyDoc.com

Roche Diagnostics of Indianapolis, a division of F. Hoffman-La Roche Ltd., the global pharmaceutical, diagnostics and vitamin company in Switzerland, partnered with Community Health Network, a four-hospital system in Indianapolis, to create MyDoc.com in the fall of 2001. MyDoc hires only board-certified primary care physicians to treat patients for the eight most commonly identified ailments.[79] It promises to diagnose and treat these ailments "within 15 to 20 minutes instead of the three to four hours an office visit typically involves."[80]

The software MyDoc uses is the same as that used by many telephone-based nurse call centers. When patients go online, they answer questions about their symptoms. Each answer generates a specific set of questions. After the questionnaire is completed, the software generates an assessment that is reviewed by a physician. If a case appears to be serious, the system immediately tells the patient to seek emergency care. If the case appears to be treatable, the physician can prescribe medication; however, MyDoc does not prescribe controlled substances or lifestyle drugs.[81]

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71. Eysenbach, *Millennium*, *supra* note 29.

72. E-medicine is used in this context to generally include both telemedicine and cybermedicine.

73. Barbara J. Tyler, *Cyberdoctors: The Virtual Housecall—The Actual Practice of Medicine on the Internet Is Here; Is It a Telemedical Accident Waiting to Happen?*, 31 IND. L. REV. 259, 263 (1998).

74. *Id.*

75. This is considered telemedicine and is beyond the scope of this Note.

76. Tyler, *supra* note 73, at 263.

77. This is referred to as cybermedicine and is the focus of this Note.

78. Tyler, *supra* note 73, at 263.

79. Hamilton, *supra* note 17 ("There are approximately 100 million instances of the top ailments . . . . Those include sinusitis, vaginitis, influenza, ear infection, upper respiratory infection, urinary tract infection, gastroenteritis, and fungal nail infection." (citation omitted)).

80. Tyler Chin, *Firm Pushes Online Medicine to New Level*, AMNEWS, Apr. 15, 2002 [hereinafter Chin, *Firm Pushes*].

81. MyDoc, Quick Summary, *at* http://www.homedoc.com/md/quicksummary.jsp (last visited

MyDoc targets employers to find busy professionals and their family members who do not want to miss work or take time off to go to the doctor for a minor, acute condition when they think they recognize their symptoms because they have had it before.[82] After approximately a year of operation, MyDoc was serving more than 17,000 patients in Indiana.[83] MyDoc expanded its service into Illinois in April 2002 through the use of three Illinois-licensed physicians serving over 2000 patients.[84] Mydoc intended to expand nationwide.[85] However, MyDoc's plans came to an abrupt halt.

B. Illinois Pulls the Plug on MyDoc.com

After just six months of operation, on October 16, 2002, the Illinois Department of Professional Regulation issued a Cease and Desist Order prohibiting MyDoc.com from treating Illinois patients.[86] The grounds for the order were two-fold: (1) violating the Illinois Medical Practice Act, which requires MyDoc to be licensed as a physician, surgeon or medical corporation and (2) doctors diagnosing and prescribing drugs online for patients with whom they had no relationship and without performing a physical examination.[87] Illinois' action was not well grounded in its existing law. In fact, Illinois does not have a statute requiring a patient physical exam. Rather, the Illinois action was based on a standard of care argument. According to Illinois regulators, Mydoc's practice of diagnosing strangers online was a "deal-breaker."[88]

The Illinois order leaves MyDoc operational only in Indiana. While Indiana has not taken any issue with MyDoc's practices,[89] several others have supported the Illinois decision, including the Illinois State Medical Society,[90] the Florida Board of Medicine,[91] and the American Medical Association.[92] More

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Oct. 22, 2003). Lifestyle drugs are those for such conditions as impotence, hair loss, and weight loss.

82. Chin, *Firm Pushes*, *supra* note 80.

83. Swiatek, *Illinois*, *supra* note 2.

84. *Id.*

85. Michael Woods, *Patients Go to the Doctor Online*, CINCINNATI POST, May 10, 2002, at 7B.

86. *Mydoc.com*, No. 200202945-1.

87. *Id.*

88. Tyler Chin, *Firm Treating Strangers by Web Shut out by Illinois Directive*, AMNEWS, Nov. 4, 2002 [hereinafter Chin, *Firm Treating*].

89. Ann Carrns, *Illinois Orders Indiana Site to Cease Medical Service*, WALL ST. J. ONLINE, Oct. 30, 2002, at D4 [hereinafter Carrns, *Illinois Orders*] ("A spokeswoman for the Indiana attorney general's office said no action is pending against Mydoc in that state."), *at* http://online.wsj.com.

90. Ronald Ruecker, Chairman of the Illinois State Medical Society's Board of Trustees, stated: "They're running an electronic doc-in-the box." Ann Carrns, *Is There a Doctor on the Desktop?*, WALL ST. J., May 2, 2002, at D6 [hereinafter Carrns, *Desktop*].

91. John Dorschner, *"Protect the Patient" Panel Aims at Web Druggists*, MIAMI HERALD, June 21, 2002, at 1 (The Florida Board of Medicine rejected MyDoc.com's application to operate

importantly, the Federation of State Medical Boards (FSMB) may have dealt the final blow when it adopted model guidelines stating that treating or prescribing based "solely on an online questionnaire consultation doesn't constitute an acceptable standard of care."[93]

III. THE USUAL COURSE OF PRACTICE

The FSMB is not alone. In recent years there has been proliferation of rules, regulations, guidelines, and policies being established by states and medical organizations to control the practice of online medicine. Analysis of these guidelines first requires an understanding of the cornerstones of medical practice: physician-patient relationships and medical standards of care.

A. Physician-Patient Relationship

1. The Nature of the Physician-Patient Relationship.—State and federal law require that in order for a doctor to be acting in the usual course of professional practice, there must be a bona fide doctor-patient relationship.[94] Traditionally, this relationship is developed through face-to-face interaction.[95] Medical communication is the "most central aspect" of the physician-patient relationship.[96] However, electronic communications and interactions between the physician and patient should supplement and enhance, but not replace, crucial interpersonal interactions that create the very basis of the physician-patient relationship.[97]

2. Establishing the Physician-Patient Relationship.—This relationship is framed by the law of both torts and contracts. The physician-patient relationship can be established through express and implied contract, reliance, and payment. The implied contract theory is based on a request and agreement for services. The physician-patient relationship begins when an individual seeks assistance from a physician with a health-related matter for which the physician may provide assistance. The relationship is clearly established when the physician agrees to undertake diagnosis and treatment of the patient, whether or not there

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in Florida, stating, "We have no desire to stop technology . . . . Our desire is to protect the patient.").

92. Chin, *Firm Treating*, *supra* note 88 (quoting AMA President-elect Donald J. Palmisano, M.D., "The AMA applauds the efforts of state authorities to aggressively police Web prescribing sites that bypass medical safeguards with disclaimers that suggest a physical examination or review of reliable medical history are irrelevant to the safety of the patient.").

93. Carrns, *Illinois Orders*, *supra* note 89.

94. Dispensing and Purchasing Controlled Substances over the Internet, 66 Fed. Reg. 21,181, 21,182 (Apr. 27, 2001).

95. Berg, *supra* note 53, at 63 ("gold standard").

96. Alissa R. Spielberg, *Online Without a Net: Physician-Patient Communication by Electronic Mail*, 25 AM. J.L & MED. 267, 277 (1999).

97. FSMB, MODEL GUIDELINES, *supra* note 42.

has been a personal encounter between the physician and patient.[98] Therefore, a physician-patient relationship will be created prior to advice, diagnosis or treatment under the pure contract model.[99]

A patient also may be able to demonstrate a physician-patient relationship if he or she can show reliance. The following criteria must be present: (1) the physician affirmatively advises the patient regarding a particular course of treatment; (2) it was foreseeable that the prospective patient would rely upon the advice; and (3) the prospective patient in fact relies upon this advice.[100] If the patient does not rely on the physician's advice, there may not be any physician-patient relationship.[101]

Finally, a physician may be held to have established a physician-patient relationship if he or she either accepts payment in advance,[102] bills the patient,[103] or is reimbursed for his or her services,[104] despite a physician's disclaimer.[105]

3. Obligation to Treat and Ability to Discontinue Treatment.—Absent contractual agreement, physicians have no legal obligation to engage in the practice of medicine or accept every patient who applies for treatment.[106] Therefore, they have the ability to screen applicants prior to accepting them. If this were not the case, physicians would lose all control of their practices and would be at the mercy of any and all care-seeking patients. The implications of this are even greater in cybermedicine, where there are fewer barriers to access.

If a physician-patient relationship is created, physicians must be cautious about how and when they discontinue treatment. If they are not, they will be subject to liability for patient abandonment. In a traditional care context, discontinuance is easier to identify. It generally requires reasonable written notice to the patient.[107] However, because of the transient and limited nature of the cyberpatient relationship, discontinuance is more difficult to define. One possibility is providing written notice to the patient. Another possibility is that the relationship is terminated as soon as a cyberpatient seeks follow-up care from another physician.[108] Regardless of the means of communication or delivery of

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98. *Id. See also* Darr & Koerner, *supra* note 41, at 19 ("Physicians who never interact with patients are held to owe a duty of care to those patients if the doctor has in the past agreed to provide medical services to that class of patient.").

99. Terry, *supra* note 57, at 349.

100. James L. Rigelhaupt, Jr., Annotation, *What Constitutes Physician-Patient Relationship for Malpractice Purposes*, 17 A.L.R.4th 132, 14 (Supp. 2003).

101. *See* Weaver v. Univ. of Mich. Bd. of Regents, 506 N.W.2d 264, 266 (Mich. Ct. App. 1993); *see also* Miller v. Sullivan, 625 N.Y.S.2d 102, 103-04 (N.Y. App. Div. 1995).

102. Hand v. Tavera, 864 S.W.2d 678, 679 (Tex. 1993) (health plan premiums).

103. BARRY R. FURROW ET AL., HEALTH LAW § 6-1(a), at 261 (2d ed. 2000).

104. Christopher J. Caryl, Note, *Malpractice and Other Legal Issues Preventing the Development of Telemedicine*, 12 J.L. & HEALTH 173, 194 (1998).

105. Gelein, *supra* note 14, at 246.

106. FURROW, *supra* note 103, § 6-1(a), at 260.

107. *See, e.g.*, IND. ADMIN. CODE tit. 844 r. 5-2-16 (2003).

108. Gelein, *supra* note 14, at 244 (citing Weaver v. Univ. of Mich. Bd. of Regents, 506

healthcare services, while the relationship exists, acceptable standards of medical practice must be upheld.[109]

B. Standard of Care

Cybermedicine must provide sufficient quality to avoid falling short of the standard of care required in traditional medicine.[110] Standards of care are developed from various sources, including common law, state statutes, federal and state agencies, and professional ethics. Although in negligence law the "jury's wisdom" or the "legislature's fiat" define the standard of care, courts look to customary medical practices as the benchmark of acceptable behavior in medical malpractice cases.[111] The standard of care will either be evaluated in terms of a local standard or a national standard, depending on where a physician is located. The locality standard compares the degree of professional skill or knowledge exercised by a physician to that of "members of his profession in good standing in the same locality."[112] Other jurisdictions subscribe to a national standard of care that requires a physician to possess the same degree of professional skill or knowledge when compared to other physicians on a national basis.[113] The conduct of general practitioners and specialists is measured by a national standard of care in most courts.[114] The national standard minimizes "conspiracy of silence" and limitation concerns with witnesses,[115] ensures uniformity, certainty and consistency, and prevents physicians from forum shopping.[116] Various commentators have suggested that the national standard of care is most appropriate in the e-medicine context as well.[117]

Various states have passed statutes and rules regulating online medicine.[118] Some of these will be discussed in the context of specific identified issues in Part

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N.W.2d 264, 267 (Mich. Ct. App. 1993)).

109. FSMB, CONDUCT AND ETHICS, *supra* note 46, § IV.

110. Spielberg, *supra* note 96, at 292.

111. James A. Henderson, Jr. & John A. Siliciano, *Universal Health Care and the Continued Reliance on Custom in Determining Medical Malpractice*, 79 CORNELL L. REV. 1382, 1384 (1994).

112. James O. Pearson, Jr., Annotation, *Modern Status of "Locality Rule" in Malpractice Action Against Physician Who Is Not a Specialist*, 99 A.L.R.3d 1133, 1140 (1990).

113. *Id.* at 1148.

114. FURROW, *supra* note 103, § 6-2, at 264.

115. *Id.* at 265.

116. Heather L. Daly, *Telemedicine: The Invisible Legal Barriers to the Health Care of the Future*, 9 ANNALS HEALTH L. 73, 104-05 (2000).

117. Tyler, *supra* note 73, at 289 ("Standards of care can be discerned through each board certified practice specialty.").

118. *See, e.g.*, N.M. ADMIN. CODE tit. 16, §10.8.8(*l*) (2001) (prohibiting prescribing drugs or medical supplies absent an established physician-patient relationship); *see also* N.Y. EDUC. LAW § 6530 (McKinney 2003) (prohibiting prescribing medication without conducting a proper clinical assessment of the patient).

IV. The Federation of State Medical Boards,[119] the American Medical Association,[120] and the Food and Drug Administration[121] have developed policies and guidelines regarding online medicine. Additionally, the Federation of State Medical Boards has encouraged state medical boards to adopt consistent language, standards and approaches for the regulation of medical practice, including regulations governing practicing medicine utilizing the Internet.[122] Many states have done so.[123] These policies and guidelines will be discussed in the context of specific issues in Part IV.

Another crucial issue is whether and to what extent the provision of medical care through electronic media enables or prevents physicians from meeting ethical standards of care. What is legally required of physicians is a "decent minimum."[124] However, these minimums likely will not satisfy ethical

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119. FSMB, CONDUCT AND ETHICS, *supra* note 46, § IV.

120. AMA, Report, *supra* note 45, at 1.

121. FDA, Buying Medicines and Medical Products Online, *at* http://www.fda.gov/oc/buyonline/ (last visited Oct. 22, 2003).

122. FSMB, CONDUCT AND ETHICS, *supra* note 46, § IV.

123. *See, e.g.*, Medical Board of California, Internet Prescribing, *at* http://www.medbd.ca.gov/buyerbeaware.htm (last visited Oct. 22, 2003) [hereinafter California]; *see also* Colorado Board of Medical Examiners, Policy 40-9, Guidelines Regarding Prescribing for Unknown Patients (Nov. 16, 2000) [hereinafter Colorado], *available at* http://www.dora.state. co.us/medical/Policy40-9.htm; Kentucky Board of Medical Licensure, Guidelines for Prescribing Controlled Substances (June 20, 1996) [hereinafter Kentucky], *available at* http://www.state.ky.us/agencies/kbml/controlledsusb.pdf; Louisiana State Board of Medical Examiners, Statement of Position, Internet/Telephonic Prescribing (May 24, 2000) [hereinafter Louisiana], *available at* http://www.lsbme.org/documents/positionstatements/InternetTelephonicPrescribing.pdf; COMMONWEALTH OF MASSACHUSETTS BOARD OF REGISTRATION IN MEDICINE, PRESCRIBING PRACTICES POLICY AND GUIDELINES 10 (Dec. 12, 2001) [hereinafter Massachusetts], *available at* http://www.massmedboard.org/regs/pdf/prescribe2.pdf; MISSISSIPPI STATE BOARD OF MEDICAL LICENSURE, RULES AND REGULATIONS, LAWS AND POLICIES 4 (Sept. 2002) [hereinafter Mississippi], *available at* http://www.msbml.state.ms.us/2003%20policy%20book.PDF; MISSOURI TASK FORCE ON MISUSE, ABUSE AND DIVERSION OF PRESCRIPTION DRUGS, A GUIDE TO PRESCRIBING, ADMINISTERING AND DISPENSING CONTROLLED SUBSTANCES IN MISSOURI 10 (June 2001) [hereinafter Missouri], *available at* http://www.dhss.state.mo.us/Publications/taskforce.pdf; New York State Department of Health, Annual Report 1999: The Year in Review (1999) [hereinafter New York], *available at* http://www.health.state.ny.us/nysdoh/opmc/annual/anrept99.htm; North Carolina Medical Board, Position Statement, Contact with Patients Before Prescribing (Feb. 2001) [hereinafter North Carolina], *available at* http://www.ncmedboard.org/contact.htm; Warren Foote, *On-Line Medical Practice*, BME REPORT (Oregon Bd. of Med. Examiners), Fall/Winter 2001, at 3 [hereinafter Oregon], *available at* http://www.bme.state.or.us/newsletter/FallWinter01.pdf; Tennessee Board of Medical Examiners, Position Statement, Prerequisites to Prescribing or Dispensing Drugs—In Person, Electronically or Over the Internet (Sept. 12, 2000) [hereinafter Tennessee], *available at* http://www2.state.tn.us/health/Downloads/g3010259.pdf; Texas State Board of Medical Examiners, Internet Prescribing Policy (Dec. 8-11, 1999) [hereinafter Texas], *available at* http://www.tsbme.state.tx.us/guidelines/ipp.htm.

124. Robyn Meinhardt & Kenneth W. Landis, *Bioethics Update: The Changing Nature of the*

requirements and expectations imposed upon physicians.[125] In fact, some commentators have suggested that cyberdoctors exhibit a "lack of clinical responsibility."[126]

Medical ethics are fundamental principles upon which all medical decisions should be based. They are not the law, but are often enforceable by state medical licensing boards through standard of care arguments.[127] The body of medical ethics is not uniform, but it is well developed. Numerous entities and commentators have identified core ethical principles for purposes of protecting cyberpatients. One of these principles is trust.[128] Indeed, one survey has shown that adults trust doctors more than nearly any other professional.[129] The Federation of State Medical Boards has identified five ethical standards that should be observed: candor, privacy, integrity, informed consent, and accountability.[130] Other ethics policies have also been created by the AMA,[131] e-Health Ethics Summit,[132] Hi-Ethics,[133] Health on the Net Foundation,[134] and the American Accreditation HealthCare Commission (URAC).[135]

IV. CYBERMEDICINE

Because it is conducted online without the benefit of face-to-face interaction, cybermedicine presents unique issues that seem to defy traditional standard of

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Doctor/Patient Relationship, 16 WHITTIER L. REV. 177, 182 (1995).

125. *Id.*

126. *See* Tyler, *supra* note 73, at 289.

127. American Medical Association, AMA Policy, H-120.956 Internet Prescribing (urging states to investigate and sanction physicians who fail to meet the local standards of medical care when issuing prescriptions through Internet web sites that dispense prescription medications). Admittedly, this is exactly what Illinois did to MyDoc.com. *See supra* Part II.B.

128. Berg, *supra* note 53, at 65-66 (citing Ezekiel J. Emanuel & Nancy Neveloff Dubler, *Preserving the Physician-Patient Relationship in the Era of Managed Care*, 273 JAMA 323, 324 (1995) (identifying the six elements of the ideal patient-physician trusting relationship as choice, competence, communication, compassion, continuity, and (no) conflict of interest)).

129. Humphrey Taylor, *Trust in Priests and Clergy Falls 26 Points in Twelve Months*, THE HARRIS POLL #63 (Nov. 27, 2002), *available at* http://www.harrisinteractive.com/harris_poll/index.asp?PID=342 (indicating 77% of adults surveyed trust doctors, following only teachers (80%)).

130. FSMB, MODEL GUIDELINES, *supra* note 42, § II.

131. COUNCIL ON ETHICAL & JUDICIAL AFFAIRS, AMA, CODE OF MEDICAL ETHICS; REPORT OF THE COUNCIL ON MEDICAL SERVICE, MEDICAL CARE ONLINE, 4-A-01 (June 2001).

132. Helga Rippen & Ahmad Risk, *Policy Proposal, E-Health Code of Ethics*, 2 J. MED. INTERNET RES. 2, e9 (MAY 24, 2000).

133. Hi-Ethics, Ethical Principles for Offering Internet Health Services to Consumers, *at* http://www.hiethics.org/Principles/index.asp (last visited Oct. 22, 2003).

134. Health On the Net Foundation, HON Code of Conduct (HONcode) for Medical and Health Web Sites, *at* http://www.hon.ch/HONcode/Conduct.html (last modified Apr. 23, 2003).

135. URAC, HEALTH WEB SITE ACCREDITATION STANDARDS (vers. 1.0, n.d.).

care conventions. As a result, physicians, patients, and states are forced to compensate for its differences and deficiencies by altering their usual practices and behavior. This Part addresses the unique and controversial issues associated with cybermedicine. Because no one single standard of care can be applied to all physicians treating all patients,[136] each parties' interests should be balanced through consideration of the factors discussed below.

A. Patient Exam and History

The most critical question regarding cybermedicine is "how one can practice good medicine without percussion, auscultation, and inspection of the patient."[137] According to most authorities, one cannot. Physicians determine what is wrong with patients by using all of their senses, not just by vision or by questions and answers. For example, a patient examination usually involves checking vital signs, listening to the heart, etc. However, with electronic communication, physicians are stripped of the ability to use their senses and confined to evaluation of the written word. As a result, failure to examine a patient face-to-face, using all the senses, creates an "incomplete picture."[138]

"An after-the-fact physical does not take the place of establishing a doctor/patient relationship."[139] The FSMB[140] and several states[141] require that a documented patient evaluation, including history and physical evaluation adequate to establish diagnoses and identify underlying conditions and/or contra-indications to the treatment recommended/provided, must be obtained prior to providing treatment, including issuing prescriptions, electronically or otherwise. Some states specify that a medical record is an essential part of a physician-patient relationship, and that it must include documentation of a patient exam and a medical history.[142] The Drug Enforcement Agency (DEA)[143] and other

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136. Henderson & Siliciano, *supra* note 111, at 1397 ("Given the existing degree of economic stratification and technological proliferation, [requiring tort law to identify a single, customary standard of care that applies to all patients] this is, in our view, an impossible task.").

137. Gelein, *supra* note 14, at 215 (quoting Jan Greene, *Sign on and Say "A-H-H-H-H-H,"* 71 HOSPS. & HEALTH NETWORKS, Apr. 20, 1997, at 46).

138. Shira D. Weiner, Note, *Mouse-To-Mouse Resuscitation: Cybermedicine and the Need for Federal Regulation*, 23 CARDOZO L. REV. 1107, 1117 (2002).

139. Dispensing and Purchasing Controlled Substances over the Internet, 66 Fed. Reg. 21,181, 21,183 (Apr. 27, 2001).

140. FSMB, MODEL GUIDELINES, *supra* note 42, § V; FSMB, CONDUCT AND ETHICS, *supra* note 46, § IV.

141. *See* California, *supra* note 123; *see also* Colorado, *supra* note 123; Kentucky, *supra* note 123; Mississippi, *supra* note 123, at 4; Missouri, *supra* note 123, at 10; New York, *supra* note 123; North Carolina, *supra* note 123; Oregon, *supra* note 123, at 3; Tennessee, *supra* note 123.

142. *See* Massachusetts, *supra* note 123, at 10; Texas, *supra* note 123; Virginia, *supra* note 123.

143. Dispensing and Purchasing Controlled Substances over the Internet, 66 Fed. Reg. at 21,183 ("[I]t is unlikely for [the physician-patient] relationship to be formed through Internet

commentators[144] agree with this concept as well.

Certain exceptions have been recognized to the exam requirement, however, including: (1) an emergency; (2) patient care in consultation with another physician who has an ongoing relationship with the patient, and who has agreed to supervise the patient's treatment, including use of any prescribed medications; and (3) on-call or cross-coverage situations in which the physician has access to patient records.[145] An additional view is that a physical exam is not required for every patient treatment situation and should be evaluated on a case-by-case basis.[146]

However, one shortcoming of those guidelines is that they do not specify how recently the exam and history must have been performed in order to be sufficient. Therefore, the guidelines should be revised to include time limits indicating how long a physician can reasonably rely on prior patient exams or history, absent physician knowledge of a change in patient circumstances. Some state statutes or regulations define "active patient" for notification purposes.[147] States could use those time frames as guides. As another alternative, health insurance coding manuals often define who is a "new patient" for billing purposes.[148]

B. Questionnaires

As an alternative to physical examinations, cybermedicine companies and doctors are using questionnaires as a way to assess the patient's medical history and current medical condition. Numerous entities, including states,[149] the

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correspondence alone. . . .").

144. *See, e.g.*, Caryl, *supra* note 104, at 194.

145. FSMB, CONDUCT AND ETHICS, *supra* note 46, § IV; *see also* Colorado, *supra* note 123; Louisiana, *supra* note 123; Mississippi, *supra* note 123, at 4; North Carolina, *supra* note 123; Tennessee, *supra* note 123.

146. Medem, eRisk Working Group for Healthcare: Guidelines for Online Communications (Nov. 2002), *available at* http://www.medem.com/corporate/corporate_erisk_guidelines.cfm ("when clinically appropriate").

147. *See, e.g.*, IND. ADMIN. CODE tit. 844 r. 5-2-16 (2003) (defining an active patient as one treated by the physician within the last two years).

148. *See How to Define "New" Patients and Code Flu Shots*, ACP-ISIM OBSERVER (Dec. 2000), *available at* http://www.acponline.org/journals/news/dec00/definecode.htm (Current Procedural Terminology (CPT) defines a new patient as "one who has not received any professional services from the physician or another physician of the same specialty who belongs to the same group practice, within the past three years").

149. *See* California, *supra* note 123; Mississippi, *supra* note 123, at 4; Missouri, *supra* note 123, at 10; North Carolina, *supra* note 123; Oregon, *supra* note 123, at 3; Tennessee, *supra* note 123, at 1.

AMA,[150] the FSMB,[151] the DEA,[152] and the FDA,[153] all agree that treatment based on a questionnaire alone is not sufficient, particularly when issuing a prescription. Specifically, the FSMB provides that treatment and consultation recommendations made in an online setting, including issuing a prescription via electronic means, will be held to the same standards of appropriate practice as those in traditional (face-to-face) settings.[154] Treatment, including issuing a prescription, based solely on an online questionnaire or consultation does not constitute an acceptable standard of care.[155] The primary reason is that "a questionnaire does not provide sufficient information for a heath-care professional to determine if that drug is for you or safe to use, if another treatment is more appropriate, or if you have an underlying medical condition where using that drug may be harmful.[156] If the patients cannot travel to the physician's office, one alternative is for the physician to supervise an exam given by a nurse or other professional and then to prescribe the needed medication based on the results, to the extent that State law allows. In this case, the decision as to the appropriateness of the medication is based on facts (e.g., symptoms and vital signs) that have been verified by a qualified third party and observed by the physician electronically.[157]

C. Medical Records

1. Traditional Medical Records.—Medical records include all "'records kept in the usual course of the practice of the healthcare provider' or, more generally, any personal information that relates to a person's health care."[158] This record usually consists of entries by medical professionals and diagnostic data. When a patient visits a physician, the patient relates his or her conditions or symptoms to the physician, who then "filters" or "distills" out the impressions or descriptions relevant to isolating the specific medical diagnoses.[159] The records and progress notes are crafted pursuant to a strict, industry-accepted standard called the "SOAP" format: "subjective—usually a quotation, selected by the health care worker, from the patient; objective—the physical exam; assessment—where the physician diagnoses and assesses the patient's symptoms;

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150. AMA, Report, *supra* note 45, at 2.

151. FSMB, MODEL GUIDELINES, *supra* note 42.

152. Dispensing and Purchasing Controlled Substances over the Internet, 66 Fed. Reg. 21,181, 21,183 (Apr. 27, 2001).

153. FDA, *supra* note 121.

154. FSMB, MODEL GUIDELINES, *supra* note 42.

155. *Id.*

156. FDA, *supra* note 121.

157. Dispensing and Purchasing Controlled Substances over the Internet, 66 Fed. Reg. 21,181, 21,183.

158. Spielberg, supra *note* 96, at 271.

159. *Id.* at 272-73.

and plan—what treatment options the physician should follow."[160] As a result, neither the patient's own words, nor a transcription of the physician-patient communication are found in the medical records.

2. Cyber Medical Records.—In cybermedicine, patients and physicians engage in the practice of medicine online, through the use of email, online questionnaires, and chats. Therefore, their communications are automatically recorded in paper or electronic format. Internet medicine guidelines developed by entities such as the FSMB[161] and Medem[162] require that these physician-patient communications be stored and filed in the patient's medical record. As a result, the patient's own words and "[t]he very interactions themselves will be recorded verbatim, serving as a transcript of the encounter,"[163] and "codified in a new or existing medical record."[164]

The implications of the storage of physician-patient communications are enormous. First, the full record of physician-patient communications will be available for use as evidence in potential subsequent lawsuits.[165] An estimated ninety percent of medical malpractice cases result from failure to document actions taken, rather than failure to take appropriate action.[166] Therefore, new Internet medicine guidelines requiring that the entire online communication be retained could have multiple effects. One possibility is that it will decrease the number of claims filed because the documentary record is complete. Another possibility is that malpractice judgments will decrease overall.[167] A third possible effect is that it will increase the number of claims because patients will be able to present written proof to substantiate their claims.

Second, some cyberphysicians will store patient records online, rather than in their office file room. As a result, consumers will have the ability to "own" their own electronic medical records and make changes and additions as necessary.[168]

Third, the online medium may not provide protection for patient confidentiality and privacy. The Health Insurance Portability and Accountability

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160. *Id.* at 274 n.62.

161. FSMB, MODEL GUIDELINES, *supra* note 42.

162. Medem, *supra* note 146.

163. Spielberg, *supra* note 96, at 274.

164. Darr & Koerner, *supra* note 41, at 10.

165. Caryl, *supra* note 104, at 183 (citing Robert F. Pendrak & R. Peter Ericson, *Telemedicine May Soon Spawn Long-Distance Lawsuits*, NATIONAL UNDERWRITER LIFE & HEALTH FINANCIAL SERVICES EDITION, Nov. 4, 1996, at *4).

166. Ann Davis Roberts, Comment, *Telemedicine: The Cure for Central California's Rural Health Care Crisis?*, 9 S.J. AGRI. L. REV. 141, 160 (1999) (citing Jeff L. Magenau, *Digital Diagnosis: Liability Concerns and State Licensing Issues are Inhibiting the Progress of Telemedicine*, COMM. & LAW, Dec. 1997, at 25).

167. *Id.*

168. Kerwin & Madison, *supra* note 64 (citing R.C. COILE, JR., NEW CENTURY HEALTHCARE: STRATEGIES FOR PROVIDERS, PURCHASERS, AND PLANS 201-23 (Chicago: Health Administration Press 2000)).

Act of 1996[169] calls for the development of standards for the electronic transmission of health information and addresses the need to protect the security, integrity and authenticity of patient health information. However, the regulation does not cover a significant portion of the health-related activities that take place online[170] because many of the Web sites are run by organizations that are not "covered entities"[171] protected under the privacy rule.[172] Websites that do not accept health insurance or do not process health claims electronically in a standard format are not covered by the regulation.[173] Ironically, as a result, patients who seek online treatment may actually be sacrificing their privacy, rather than protecting it.

D. Response Time

Patients visiting a physician in a traditional clinical setting receive an immediate, real-time response from the physician when they communicate their information or concerns. Cyberpatients, on the other hand, must wait for an online response. Currently, Internet medicine guidelines provide that turnaround time should be established for patient-physician email.[174] However, the guidelines do not specify what that online response time should be or how it should be determined.[175] Guaranteed response time could significantly encourage patients and physicians to engage in cybermedicine. Failure to do so could have a chilling effect.

One primary reason for the development of cybermedicine has been patient dissatisfaction with managed care and its associated time delays.[176] Similarly, "patients relying on cyberdoctors to promptly answer their questions could be wasting valuable time waiting for a response."[177] Therefore, patients will not switch to online medicine if it fails to meet their efficiency needs. Indeed, one study has indicated that patients are very receptive to communicating with their doctor online so long as the doctor actually replies in a timely manner.[178] It is also in physician's best interest to guarantee and adhere to response times.

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169. Health Insurance Portability and Accountability Act of 1996 (HIPAA), Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 29 U.S.C. and 42 U.S.C.).

170. ANGELA CHOY ET AL., PEW INTERNET & AMERICAN LIFE PROJECT, EXPOSED ONLINE: WHY THE NEW FEDERAL HEALTH PRIVACY REGULATION DOESN'T OFFER MUCH PROTECTION TO INTERNET USERS 1 (Nov. 2001), *available at* http://www.pewinternet.org/reports/pdfs/Pip_Hpp_HealthPriv_report.pdf.

171. Security and Privacy, 45 C.F.R. § 164.104 (2001) (regulating health plans, healthcare clearing houses, and healthcare providers who transmit health information in electronic form).

172. CHOY, *supra* note 170, at 7.

173. *Id.* at 19.

174. *See* FSMB, MODEL GUIDELINES, *supra* note 42; *see also* Medem, *supra* note 146.

175. Weiner, *supra* note 138, at 1125.

176. *See supra* notes 12-21 and accompanying text.

177. Wiesemann, *supra* note 54, at 1143.

178. FOX & RAINIE, VITAL DECISIONS, *supra* note 33, at 27.

Patients who have continuous access to their physician may be more satisfied and loyal due to the timeliness of their communications.[179] Also, as cyberpatients summon physicians to their computers[180] more and more, patients will likely grow more comfortable with the online process and their expectations will increase. As a result, a cyberpatient may attempt to hold his or her physician liable for failure to respond quickly enough.[181]

Although this issue probably does not necessitate a regulatory solution, cyberphysicians would be well advised to give patient expectations and response time added consideration. There are a number of possible solutions to these efficiency concerns. First, online practices could post guaranteed response times on their websites. In this way, patients would be on notice and would be able to choose whether or not to continue to "visit" that physician. Additionally, online practices could tailor their response times based on feasibility and reasonableness. Second, the FSMB could modify its guidelines to specify cyberphysician response time. The disadvantage of this option is that it is not flexible for the day-to-day operations of a medical practice and it does not take into consideration a physician's availability. Finally, cyberpractices could create a "cyberreceptionist" to perform intake of patient emails and online inquiries, much like a receptionist in a brick-and-mortar practice. The cyberreceptionist could then inform the patient of the expected response time based on current practice situations and physician availability. While this may seem like an unnecessary expenditure of time and resources, it does have an added advantage. A cyber-receptionist will be able to screen the inquiry to determine the feasibility and desirability of treatment. In this way, a cyberpractice may be able to screen patients and limit a physician's duty to treat an unknown patient online.[182]

E. Verification of Physician Credentials

Cybermedicine can mask physician identity, thereby inhibiting patient needs and desires.[183] Unfortunately, there is often no way for the patient to know

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179. Kerwin & Madison, *supra* note 64 (citing J. Sharma, *Using Internet Tools to Improve Care, Save Time, and Enhance Financial Performance*, HEALTH INTEGRATION TECHS. TODAY (2001), *at* http:llw.healthit.com/resources.internettools.htm).

180. *See* Deady, *supra* note 32, at 895; *see also* Ann Carrns, *Desktop*, *supra* note 90; Tyler, *supra* note 73, at 283 ("Those beepers physicians carry can now signal, not just physicians on-call for their office patients, but physicians on-call for any potential Internet patient who signs on to their web site worldwide.").

181. *See* St. Charles v. Kender, 646 N.E.2d 411, 412-14 (Mass. App. Ct. 1995) (stating a physician may be negligent for failing to return a patient's telephone call during a reasonable period); Smith v. United States, 119 F. Supp. 2d 561, 577 (D.S.C. 2000) (suggesting physicians may be negligent for failing to follow reasonable communication procedures in place).

182. *See supra* Part III.A.3.

183. FOX & FALLOWS, INTERNET HEALTH RESOURCES, *supra* note 26, at 9 (finding that 21% of health seekers have looked for information about a particular doctor or hospital); *see also* ELLIOT M. STONE ET AL., THE COMMONWEALTH FUND, ACCESSING PHYSICIAN INFORMATION ON THE

whether the person purporting to provide the services is licensed or competent to do so,[184] primarily because "there are no national or local standards for format, content, or documentation."[185] Medical websites are maintained by various entities, but none have all the content and structure needed by consumers, as they exhibit deficiencies in quantity, quality, and choice of information.[186] Because the current disjointed system prevents state licensing boards from sharing information with each other, there is often no way for a state to know if a physician is licensed, under suspension, or has lost his or her license to practice in a given state.[187] Other sites that are self-reported by physicians are not independently verified and are inaccurate.[188] Commercial websites may include physicians without their knowledge, require physicians to pay a fee, prohibit them from editing their records, contain a "preponderance of empty fields," and not provide a disclosure as to verification or authenticity.[189] Because a publisher has no duty to investigate and warn its readers of the accuracy of the contents of its publications, absent a guarantee, a publisher will be deterred by potential liability from doing so.[190]

Internet medicine websites should identify their treating physicians, as it will provide added assurance to patients. A patient who has difficulty in discerning the identity and practice location of physicians participating in Internet Web sites challenges the accountability and questions the legitimacy of the Web site.[191] There are numerous options for providing physician identification. The most basic option is professional guidelines, which recommend that physicians be identified on their websites,[192] including name, practice location, and all states in which licensure is held.[193] A second option is state action. The FSMB recommends that state medical boards require physicians to list any Web-based professional activities on their license applications and to provide identifying information on any Web sites for which they prescribe.[194] Additionally, states could pass physician-profiling legislation. The profiles would include gender,

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INTERNET 2 (Jan. 2002) ("Healthy consumers, on the other hand, may be more likely to be interested in information about convenience and logistics. Ill consumers may be interested in the doctor's experience with a certain illness or the number of procedures of a certain type the physician has performed (and the outcomes)."), *available at* http://www.cmwf.org.

184. Deady, *supra* note 32, at 906.

185. STONE, *supra* note 183, at 9.

186. *Id.* at 4.

187. Daly, *supra* note 116, at 88.

188. STONE, *supra* note 183, at 7.

189. *Id.* at 8.

190. Terry, *supra* note 57, at 355-56.

191. AMA, Report, *supra* note 45, at 3.

192. Medem, *supra* note 146.

193. AMA, Report, *supra* note 45, at 3.

194. Berkeley Rice, *The Growing Problem of Online Pharmacies*, MED. ECON. (June 4, 2001); *see also* Wiesemann, *supra* note 54, at 1153 (recommending physicians be required to post resumes on their Websites).

medical school, and specialty board certification on all physicians licensed in the state.[195] A third option is federal action. Regulations on National Provider Identifiers, required by the administrative simplification provisions of the Health Insurance Portability and Accountability Act (HIPAA) but not yet legislated, would make doctors easier to locate across organizations and websites.[196] Additionally, the Federal Trade Commission has urged Congress to require Internet pharmacy sites to disclose prescribing physicians' identities and traits, including name, address, phone number, and states in which they are licensed.[197]

The most efficient and effective option is the establishment of a national database. This Cyberdoctor Data Bank could be used "to review qualifications posted over the Internet and to confirm that they coincide with the cyberdoctor's credentials."[198] Currently, many state medical boards maintain electronic databases of physicians licensed in their state. However, a cyberpatient attempting to research a cyberphysician could potentially be forced to search all fifty states to verify a physician's licensure or to try to get the "full picture." A national databank would give patients, physicians, and states one central location to submit and seek information. This databank could be established and maintained by the Federation of State Medical Boards. The information could be stored by physician name, the Unique Physician Identifier under HIPAA, or the "digital credentialing" system for which the AMA is lobbying.[199] In the alternative, the National Practitioner Data Bank (NPDB) already tracks physician malpractice claims and disciplinary actions against physicians' licensure, privileges, and professional membership.[200] Currently, the information contained in the NPDB is confidential and inaccessible to the public.[201] However, because a reporting mechanism already exists between the states and the NPDB,[202] Congress could pass legislation creating a separate division of the NPDB to which physicians and states must submit and verify information on practitioners for consumer access.

F. Follow-Up

One pitfall of cybermedicine is that Internet medicine companies do not require follow-up care. Brick-and-mortar physician offices generally set up a follow-up appointment with the patient either when he or she is leaving the office or notifies the patient by mail or telephone. In a fee-based online consultation,

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195. STONE, *supra* note 183, at 7-8 (citing California as an example).

196. *Id.* at 10.

197. Rice, *supra* note 194.

198. Wiesemann, *supra* note 54, at 1154.

199. *Terry Advocates Overhaul of Cybermedicine Practices*, ST. LOUIS BUS. J. (Feb. 4, 2000), *available at* http://stlouis.bizjournals.com/stlouis/stories/2000/02/07/focus6.html.

200. Health Care Quality Improvement Act, 42 U.S.C. §§ 11131-11133 (1994).

201. 42 U.S.C. § 11136 (1994). *See* 45 C.F.R. 60.13 (1996) (explaining that access to the National Practitioner Data Bank is strictly controlled and not granted to consumers).

202. *See* 42 U.S.C. § 11132 (1994).

the healthcare provider has the same obligations for patient care and follow up as in face-to-face, written and telephone consultations.[203] Online medicine guidelines specify that an online consultation should include an explicit follow-up plan that is clearly communicated to the patient.[204] In addition, some states require insured availability of the physician or coverage for the patient for appropriate follow-up care, regardless of the consultation medium.[205] Failure to perform proper patient follow-up may present potential hazards to the patient in the event of side effects, if the condition worsens, or if there is a drug interaction.[206] Therefore, in order to satisfy this standard of care, cyberdoctors will either have to guarantee their availability and commit to being the patient's follow-up physician or create and maintain a relationship with the patient's follow-up physician, much like a consulting physician in a telemedicine setting.

G. Prescribing

The ability to prescribe medication over the Internet, one of cybermedicine's most attractive features, may be one of its most problematic. One of the primary reasons patients like to purchase prescription drugs online is privacy. Consumers are increasingly seeking out the opportunity to buy these drugs from the privacy of their own homes.[207] However, patients may be sacrificing their safety in exchange for anonymity. By definition, prescription drugs are not safe for use except under a properly licensed physician's supervision.[208] Therefore, the act of prescribing and taking medication absent a physician examination, monitoring, and/or follow-up is inherently dangerous. In fact, the FDA has issued a tip to consumers to not buy from sites that offer to prescribe a prescription drug for the first time without a physical exam.[209] In addition, physicians have much greater liability exposure when they prescribe online. Finally, online prescribing may have public health implications.

1. Fraud, Deceit and Mistake.—The anonymity of the Internet is convenient, but it is dangerous for physicians who may become victims of patient fraud, deceit, and mistake. A physician treating a patient online "cannot know whether the patient is a poor historian, a liar, a charlatan, or someone with Munchausen's syndrome."[210] A consumer can more easily provide false information in a questionnaire than in a face-to-face meeting with a practitioner.[211] In fact, "consumers often lie, withhold information, or mask their identity on the Web to

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203. Medem, *supra* note 146.

204. *Id.*

205. *See* Tennessee, *supra* note 123, at 1; *see also* Texas, *supra* note 123.

206. California, *supra* note 123.

207. Kara M. Friedman, *Internet Prescribing Limitations and Alternatives*, 10 ANNALS HEALTH L. 139, 141 (2001).

208. Food and Drug Act, 21 U.S.C. § 353(b)(1)(A) (2002).

209. FDA, *supra* note 121.

210. Tyler, *supra* note 73, at 288.

211. Missouri, *supra* note 123, at 10.

maintain anonymity."[212] According to a 1999 survey, almost one out of six U.S. adults have taken extraordinary steps to maintain the privacy of their medical information.[213] "They withhold information from their doctors, provide inaccurate or incomplete information, doctor-hop to avoid a consolidated medical record, pay out-of-pocket for care that is covered by their insurance, and even avoid care altogether."[214]

One reason cyberpatients may exhibit this behavior is due to drug addiction. The reality is, any person with a computer, without regard to age, capacity, medical condition, or otherwise, can go online and obtain prescription medications. At a time when an estimated one-third of drug abuse comes from prescription drugs,[215] cybermedicine compounds an already existing problem. Rejected drug buyers can simply resubmit their orders as many times as they need to, omitting or changing troubling information, in order to avoid online barriers to access.[216] The problem is, a patient with an addiction might appear quite reasonable when requesting medication, but could actually be hiding behind a cybermask. Therefore, the cyberphysician would be unable to observe any obvious warning signs of substance abuse, such as the smell of a patient's breath or the fact that the patient has not showered for two weeks.[217]

A second explanation is that patients may make an honest, or a presumed harmless, omission. They may not understand the questionnaire or remember everything that they're taking when they answer it.[218] Or, even worse, they may purposely leave off information that they think is unimportant, given the isolated purpose and brief nature of their "e-visit." As a result, a cyberpatient may omit important information by mistake or intention.

If patients are allowed to abuse the system, it will not only compound our country's already serious prescription drug-abuse problem, but it will also subject physicians to greater liability risk. In fact, one commentator has suggested imposing a greater burden on physicians.[219] Another commentator has suggested that "[f]rom a public relations perspective, prosecuting physicians for Internet prescribing is a can't-lose proposition."[220]

There are a number of ways to minimize or eliminate these concerns. The

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212. CHOY, *supra* note 170, at 20.

213. *Id.* at 4 (citing PRINCETON SURVEY RESEARCH ASSOCIATES, CALIFORNIA HEALTHCARE FOUNDATION, CONFIDENTIALITY OF MEDICAL RECORDS: NATIONAL SURVEY (Jan. 1999)).

214. *Id.*

215. Eric M. Peterson, *Doctoring Prescriptions: Federal Barriers to Combating Prescription Drug Fraud Against On-Line Pharmacies in Washington*, 75 WASH. L. REV. 1331, 1335 (2000).

216. Rice, *supra* note 194.

217. Gelein, *supra* note 14, at 237 & 253.

218. Rice, *supra* note 194.

219. Gelein, *supra* note 14, at 253 (suggesting a heightened expectation to "read between the lines" and inquire about a cyber-patient's medical history or surrounding circumstances).

220. Silverman, *supra* note 69, at 273 (citing public protection, prompt execution of cyber-justice, and the fact that Internet prescribing physicians are seen as outliers or mavericks, so disciplinary action would not run afoul of conservative state medical societies).

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most basic is to require identification of the actual patient who is signing on for the medical service.[221] Additionally, some online doctors may not fill a prescription without a referral from another physician who has seen the patient. Perhaps the most effective means "[t]o make sure fakers don't hoodwink the site"[222] is to prohibit the issuance of controlled substance prescriptions pursuant to an online consultation. The DEA may be the most appropriate entity to promulgate these regulations, as it would be more efficient than the individual states doing it.

2. Threat of Over-Prescribing.—By eliminating barriers to prescribing practices, cybermedicine may have public health impacts. The majority of patients are going online for prescriptions[223] or prescription refills.[224] Without a physical exam, physicians may not have or may not think they have the ability to screen for the clinical appropriateness of those prescriptions. In fact, a survey has shown that 41% of physicians prescribe unnecessary antibiotics out of fear of malpractice liability.[225] Compounding this problem is the fact that antibiotic resistance is a public health crisis today.[226] The proliferation of online treatment will only further the problems our society faces from over-prescribing, including added costs and increased antibiotic resistance. Therefore physicians should be prohibited from prescribing medication online absent a pre-existing physician-patient relationship, which should include a "current" physical examination. In addition, states should provide guidelines for physicians regarding online prescriptions, including conditions that can be treated pursuant to an online consultation and whether refills should be allowed.

H. Self-Education and Self-Diagnosis

1. The Result of Education: Empowerment.—The most compelling

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221. Gelein, *supra* note 14, at 215 (quoting Jan Greene, *Sign on and Say "A-H-H-H-H-H,"* 71 HOSPS. & HEALTH NETWORKS, Apr. 20, 1997, at 46).

222. Lisa Ramirez, *Online Doctors Stirring Debate Internet Consultations Are Becoming More Popular, but Some Physicians Call Them Prescriptions for Trouble*, THE PRESS-ENTERPRISE (Riverside, CA), Aug. 9, 1999, at A01.

223. Carrns, *Desktop*, *supra* note 90 (according to MyDoc's General Manager, so far it has completed more than 800 "visits," 65% of which resulted in a prescription).

224. *See* Spielberg, *supra* note 96, at 287 (showing some patients will want to limit e-mail use to administrative messages such as prescription refills); *see also* Gelein, *supra* note 14, at 228-29 (Cyberdocs.com has reported that approximately 90% of their online consultations result in a prescription request.).

225. Humphrey Taylor, *Most Doctors Report Fear of Malpractice Liability Has Harmed Their Ability to Provide Quality Care: Caused Them to Order Unnecessary Tests, Provide Unnecessary Treatment and Make Unnecessary Referrals*, HARRIS POLL #22 (May 8, 2002), *available at* http://www.harrisinteractive.com/harris_poll/index.asp?PID=300.

226. WORLD HEALTH ORGANIZATION REPORT ON INFECTIOUS DISEASES 2000, OVERCOMING ANTIMICROBIAL RESISTANCE (2000), *available at* http://www.who.int/infectious-disease-report/2000/intro.htm.

psychological aspect of Internet medicine is empowerment. Patient empowerment can be attributed to three factors. The first is that the number of Internet users continues to rise.[227] The computer is becoming a "patient's assistant," through which he or she can access medical information and participate in making his or her own clinical decisions.[228] The second is that the profile of Internet users has a bias towards more affluent, better-educated consumers.[229] The third is the increasing availability of information on the Internet. This is contributed to not only by private companies, but also by the federal government.[230]

2. The Shift of Control: Balance.—The advent of cybermedicine has left commentators, physicians, and patients squabbling over who should have control on the continuum of patient healthcare. The traditional view is that "physicians . . . should control all aspects of medical practice."[231] In this case, power is "asymmetrically distributed, resting entirely in the hands of the physician."[232] The success of this approach relies on trust. At least one study has shown that patients do trust physicians,[233] which leaves one wondering why patients are demanding more control over their healthcare decisions. The answer: because they need it, they want it, and they can get it.

The centrist viewpoint emphasizes a balance between the physician and patient, or "shared decision making."[234] Under this approach, physicians' most important function is to "help their patients make decisions among competing options of therapeutic interventions."[235] In this way, the physician and the patient are partners in the healthcare decision making process and share "mutual responsibility."[236] Part of the reason for the need to seek information and participate in their own decision-making has been the increase in managed care and the limited access to health resources.[237] Additionally, access to online information can help bridge the medical knowledge gap between physicians and

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227. Taylor, *Internet Penetration*, *supra* note 24 (indicating that the number of adult online users went up from 127 million in fall 2001 to 137 million in spring 2002).

228. WARNER V. SLACK, M.D., CYBERMEDICINE: HOW COMPUTING EMPOWERS DOCTORS AND PATIENTS FOR BETTER HEALTH CARE Ch. 3 (2d ed. 2001).

229. Taylor, *Internet Penetration*, *supra* note 24.

230. Green, *supra* note 19, at 385 (suggesting Federal regulation of drug and medical device Internet advertising is aimed at enabling current and potential medical supply consumers to obtain as much access as possible to accurate information concerning the legal drugs and devices that may be prescribed for them).

231. Wiesemann, *supra* note 54, at 1136 (quoting JAY KATZ, M.D., THE SILENT WORLD OF DOCTOR AND PATIENT 17 (1984)).

232. *Id.* at 1135.

233. *See supra* note 129 and associated text.

234. FOX & RAINIE, REVOLUTION, *supra* note 16, at 8.

235. Sieving, *supra* note 30 (quoting R.F. Brubaker, *Decisions, decisions*, 106 OPHTHALMOLOGY 165-68 (1999)).

236. Wiesemann, *supra* note 54, at 1135.

237. Tyler, *supra* note 73, at 264.

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patients, facilitate discussion between the parties, and help effect true informed consent.[238] However, sometimes patients take this process to the extreme.

The final view represents patients' desires to have full control,[239] i.e., perform self-diagnosis. Some argue that this is a means for patients to take back control from politicians and government regulators.[240] The concerns associated with this approach are two-fold. First, self-diagnosis can be dangerous and may prevent determination of the actual underlying cause.[241] Second, physicians have been trained to become skillful artisans of the practice of medicine. Failure of patients to allow physicians to practice that art will not only directly impact physicians and their livelihoods, but it will "shortchange the patient" by preventing the physician from adequately using all his or her skills.[242] After all, "[w]hat seems to be a cold . . . could be something more serious."[243]

Patients are definitely taking a more active role in their own healthcare. While it is suggested that there is no actual evidence people are doing "completely whacky self-diagnoses,"[244] it is clear they are doing some form of it. Not only are the majority of patients using the Internet to gather healthcare information,[245] but nearly one in five health seekers say they have gone online to diagnose or treat a medical condition on their own, without consulting their doctor.[246] The best solution seems to be a balance of physician authority and patient informed consent. In order to do that, consumers should take ample time to search for health advice,[247] visit multiple sites[248] to verify their validity and timeliness,[249] and "discuss the information with a health care provider before making a treatment decision."[250]

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238. Silverman, *supra* note 69, at 260.

239. Kyle L. Grazier, Editorial, 47 J. HEALTHCARE MGMT. 281 (Sept. 1, 2002); Henderson & Siliciano, *supra* note 111, at 1392.

240. Silverman, *supra* note 69, at 267.

241. California, *supra* note 123.

242. Wiesemann, *supra* note 54, at 1141.

243. Marc Davis, *Internet Doctors Make a Cyber Move to Illinois*, CHI. TRIB., May 5, 2002, at 6A (quoting Donald Palmisano, M.D., of the AMA Board of Trustees).

244. Angela Stewart, *Medical Knowledge Is Power for Most Web Users, Survey Finds—Although Many Don't Verify Sources, They also Don't Self-Diagnose*, STAR-LEDGER (Newark, NJ), May 23, 2002, at O49.

245. FOX & RAINIE, VITAL DECISIONS, *supra* note 33, at 5 (indicating 55% of health seekers have gathered information before visiting a doctor).

246. *Id.* at 21 (18%).

247. *Id.* at 24 (recommending spending at least 30 minutes on a search).

248. *See* Tyler, *supra* note 73, at 271 (suggesting second and third opinions); *see also* FOX & RAINIE, VITAL DECISIONS, *supra* note 33, at 17 (suggesting visiting four to six sites).

249. Stewart, *supra* note 244, at O49 ("[O]nly a quarter [of health seekers] follow recommended procedures for checking the source and timeliness of the information.").

250. FOX & RAINIE, VITAL DECISIONS, *supra* note 33, at 17.

I. Patient Accountability

The increased levels of patient empowerment, decision making, and control in cybermedicine beg one question: who should be held responsible when something goes wrong. Most often, it is the physician. However, as is the fact in face-to-face interactions, patients still retain some responsibility and accountability for their decisions to seek medical advice solely on the Internet.[251] That accountability is dependent upon a duty:

> "Not every casual response, not every idle word, however damaging the result, gives rise to a cause of action . . . . Liability in such cases arises only where there is a duty, if one speaks at all, to give the correct information. And that involves many considerations. There must be knowledge, or its equivalent, that the information is desired for a serious purpose; that he to whom it is given intends to rely and act upon it; that, if false or erroneous, he will because of it be injured in person or property. Finally, the relationship of the parties, arising out of contract or otherwise, must be such that in morals and good conscience the one has the right to rely upon the other for information, and the other giving the information owes a duty to give it with care."[252]

One question that arises is whether cybermedicine liability will be evaluated under contract or tort principles. The answer is both, depending on the circumstances of the case. Once a contract is formed, both parties have a duty to perform in satisfaction of its terms. A contract is voidable if either party engaged in fraud in creating it.[253] Therefore, if a patient seeks out a physician, fraudulently concealing his or her personal information or condition, the contract may be voidable, extinguishing the physician's duty to perform.

Under the tort law of negligence, both contributory negligence and assumption of risk principles may be applied. In order to avoid negligence liability, a physician's duty is "to conform to the legal standard of reasonable conduct, in light of the apparent risk."[254] In contributory negligence, if a patient contributes to her own harm, she may be denied recovery, because her own conduct disentitles her to maintain an action.[255] In addition, an injured patient can be held liable if she is found to have assumed the risk, either through express or implied agreement. In order to establish this defense, three elements must be shown: (1) the patient must know that the risk is present; (2) the patient must understand the nature of the risk; and (3) the patient's choice to incur the risk must be free and voluntary.[256] If the danger is out of all proportion to the value

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251. Deady, *supra* note 32, at 907.

252. Terry, *supra* note 57, at 358 (quoting Int'l Prods. Co. v. Erie R.R. Co., 155 N.E. 662, 664 (N.Y. 1927)).

253. JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 18, at 356 (4th ed. 2001).

254. W. PAGE KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 53 (5th ed. 1984).

255. *Id.* § 65, at 451-52.

256. *Id.* § 68, at 486-87.

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of any benefits involved, the patient may also be charged with contributory negligence for unreasonably choosing to confront the risk.[257] If there is a reasonably safe alternative open, the patient's choice of the dangerous option may amount to assumption of risk, negligence, or both.[258]

There are currently two contradicting schools of thought on duty of care as they pertain to assumption of risk. One suggests that doctors practicing medicine over the Internet have a greater duty of care than traditional doctors because cyberdoctors assume the risk of possible misdiagnosis by relying on information provided by their patients.[259] The other suggests that cyberdoctors owe patients a lesser duty of care than traditional doctors by placing the assumption of risk with the patients, especially in situations where patients choose to consult only one on-line doctor or where a patient misrepresented his or her ailments or neglected to seek follow-up care.[260]

Regardless of the body of law under which it will be evaluated, when a consumer seeks online treatment from a physician, he or she will likely create for himself or herself a duty. Under either body of law, a patient could and should be held partially or wholly liable if he or she knowingly gives insufficient or false information to the consulting physician, or knowingly disobeys instructions during the course of treatment which results in the patient's own harm. According to online medicine guidelines, patients should be put on notice that physicians are relying completely on information provided to them by the patient.[261] Additionally, documentation of all communications should be maintained so that each party has sufficient evidence available for their defense.[262] This is especially important for physicians, as patients have no legal duty to maintain their own medical records and may have added incentive to destroy them if they are going to be held liable for their behavior.

J. Physician Liability

Cybermedicine presents unique physician liability. Not only are physicians at a greater liability risk, but they may also find their cases harder to defend. One factor contributing to the increased liability risk is the inherent difficulty in identifying symptoms and indications without a visual encounter. A second factor is lack of a prior physician-patient relationship.[263] A third factor is the enhanced ability of patients who have suffered adverse results to discover possible causes that can be attributed to the provider, or "information torts."[264]

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257. *Id.*

258. *Id.*

259. Ruth Ellen Smalley, Note, *Will a Lawsuit a Day Keep the Cyberdocs Away? Modern Theories of Medical Malpractice as Applied to Cybermedicine*, 7 RICH. J.L. & TECH. 29, 41 (2001).

260. *Id.* at 42.

261. Medem, *supra* note 146.

262. Spielberg, *supra* note 96, at 274.

263. Tyler, *supra* note 73, at 288.

264. Terry, *supra* note 57, at 330-31.

There are differing opinions as to what law should apply in multi-state cybermedicine cases. Some authorities have suggested that the physician should be presumed as visiting the patient in the state in which the patient resides,[265] while others have suggested that the patient should be presumed as visiting the physician in the state in which the physician is licensed.[266] Choice of jurisdiction has widespread implications on physicians, patients, and states. Each state has different levels of patient and liability protections. Therefore, physicians need to know their liability exposure risk so they can insure it, patients need to know where they can bring a malpractice action and what their rights to recovery are, and states need to know who they are regulating and protecting. Guidelines should specify which jurisdiction's laws apply in cases of online medicine. Until this issue is settled, the proliferation of cybermedicine may be restricted by physician choice of cyberpractice.

Cyberphysicians and states both have an interest in the establishment of guidelines. Cyberphysicians may be placing their license to practice medicine at risk. Until states adopt guidelines pertaining to online medicine, physicians cannot be assured which practices are acceptable and which ones are not. Therefore, they may be deterred from engaging in such practices until they have sufficient confidence they will not be professionally sanctioned. States should put physicians on notice as to their rights and responsibilities. By adopting policies and guidelines, states can best ensure physicians' due process rights in disciplinary proceedings.[267]

Cybermedicine guidelines will assist physicians, courts, and expert witnesses in cybermalpractice cases. The guidelines can provide cyberphysicians with legitimate defenses to medical negligence actions.[268] Courts will consider such standards when determining liability;[269] however, courts are not obligated to accept and apply industry[270] or government[271] guidelines in the determination of standard of care. If the courts do accept the cybermedicine guidelines standard, the jury will decide how much weight to accord it.[272] If courts think the industry standard is inadequate, they may apply their own standard.[273] Until the practice of cybermedicine matures, the limited industry experts may be reluctant to testify in malpractice cases. These experts may engage in a "conspiracy of silence" in an effort to limit liability and support the development of the discipline.[274] Establishment of industry guidelines would curb disincentives or expert witnesses and reduce the problem posed by ambiguous medical practice

265. *See, e.g.*, FSMB, MODEL ACT, *supra* note 46; *see also* Deady, *supra* note 32, at 904.
266. *See, e.g.*, Tyler, *supra* note 73, at 264.
267. Silverman, *supra* note 69, at 272.
268. Smalley, *supra* note 259, at 51.
269. Caryl, *supra* note 104, at 198-99.
270. Smalley, *supra* note 259, at 53.
271. Caryl, *supra* note 104, at 198-99.
272. Smalley, *supra* note 259, at 53.
273. Caryl, *supra* note 104, at 198-99.
274. Darr & Koerner, *supra* note 41, at 23.

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standards.[275]

CONCLUSION

MyDoc.com is an excellent example of the need for states to define the appropriate cybermedicine standards of care. Two separate states, each observing the exact same company operating in their state with the exact same practices, have reached opposite conclusions.[276] Illinois has stated that MyDoc violates patient standards of care, while Indiana has not.[277] In addition, Illinois actually rendered two separate, juxtaposed opinions under the authority of two separate Department Directors.[278] This inconsistency is unfortunate for everyone involved. Patients have a right to know what physicians they are allowed to "visit." Similarly, physicians have a right to know what patients they are allowed to treat and how, and they should be able to rely on that information. Finally, state medical boards should have a way to ensure consistency not only within their own state, but also among other states, in light of cybermedicine's mobility.

Cybermedicine is an amorphous medical specialty. Although it contains the same major players and serves the same patient treatment purposes, it defies nearly all traditional medical practice conventions. Its online nature allows both physicians and patients to maintain mobility and anonymity. Additionally, because cyberphysicians cannot use all the senses and skills upon which they would rely in a face-to-face encounter, they are handicapped by the degree and reliability of patient disclosure. Traditional medical standards of care have been developed and habitualized over time. However, in cybermedicine, many traditional medical practice customs and conventions cannot be applied. While the standard of care has not changed, the means of satisfying it must. Cyberphysicians can no longer take traditional customs and norms for granted. They must modify and redefine their practices and procedures, and the industry must help them.

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275. EDWARD P. RICHARDS III & KATHARINE C. RATHBUN, LAW AND THE PHYSICIAN: A PRACTICAL GUIDE 68-69, 76-77 (1993).

276. *See* Dorschner, *supra* note 91, at 1 (stating a third state, Florida, refused to allow MyDoc for the same reasons).

277. As recently as December 5, 2002, the Medical Licensing Board of Indiana received testimony from MyDoc.com officials; however, it has not filed any charges against the company. A copy of these minutes is available at http://www.ai.org/hpb/boards/mlbi/ (last visited on Feb. 27, 2004). As of July 1, 2002, Indiana finally promulgated Online Prescribing Rules, which were originally presented to the Board in October 2002. The Rules were filed October 1, 2003 and became effective October 31, 2003. Final Rule, 27 Ind. Reg. 521 (Nov. 1, 2003). *See* IND. ADMIN. CODE tit. 844, 5-3-1 (2003) and IND. ADMIN. CODE tit. 844, 5-4-1 (2003). As of the date of this publication, the Board has not pursued any disciplinary action.

278. Swiatek, *Illinois*, *supra* note 2, at C01 (according to MyDoc General Manager Daniel Briggs, the Illinois Cease and Desist order was issued only after a new director took over the Department of Professional Regulation; the previous director did not feel as though MyDoc was in violation).

Numerous authorities have suggested that the new threshold for satisfying the cybermedicine standard of care should be a prior physician patient relationship or a patient examination prior to treatment and diagnosis.[279] However, because cybermedicine is so unique, new customs must also be developed in other areas, including medical records, response time, physician identification, follow-up, prescribing, and decision-making. In addition, because the control of patient care has shifted so much to the patient, theories of patient accountability should be advanced and enforced in the cybermedicine context. While some of these issues are covered by the newly created Federation of State Medical Boards guidelines, not all of them are. Therefore, the Federation should revise its Guidelines to address these deficiencies. Those provisions which the Federation does not address should be seriously considered by states when drafting and adopting their guidelines and by courts when they begin adjudicating cybermalpractice cases.

Although all states regulate medicine independently, cybermedicine is sufficiently different to demand nationwide attention. Adoption of uniform guidelines across the United States would prevent physicians from forum-shopping,[280] prevent patients from physician-shopping,[281] provide patients and physicians with sufficient notice as to their rights and obligations, and prevent states from rendering arbitrary and unpredictable decisions. Additionally, while compliance with guidelines likely will not bar a finding of liability by the courts,[282] the existence of guidelines will take the burden off of both courts and expert witnesses.[283] States should continue to define their own licensure and registration requirement for doctors, including cyberdoctors. Additionally, not only should states create policies and adopt guidelines to define cybermedicine standards of care, but all states should adopt and apply the same ones. The Federation of State Medical Board guidelines are the appropriate model, with the above-suggested modifications, for states to adopt.

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279. *See supra* Part IV.A.

280. *See supra* Part IV.J.

281. S.B. 1828, 1999 Reg. Sess. (Cal. 2000), cmt. 2 ("Thus, the risk exists that people will be able to obtain dangerous drugs for the asking as long as they turn to the right physician on the right web site in the right state.").

282. *See supra* notes 269-71 and accompanying text.

283. *See supra* notes 274-75 and accompanying text.

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